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No. 717

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Supreme Court of the United States

OCTOBER TERM, 1954.

SYDNEY J. WOOD, doing business under the firm name and style of 53RD STREET SUBWAY LIQUOR STORE,

Petitioner,

against

JOHN M. O'GRADY, individually and as President, and "JAMES DOE", name fictitious, true name unknown to plaintiff, individually and as Treasurer of the Wine and Liquor Store Employees Union, Local 122, A. F. of L., WINE AND LIQUOR STORE EMPLOYEES UNION, LOCAL 122, A. F. of L., and "JOHN DOE", "RICHARD ROE", "MICHAEL DOE", *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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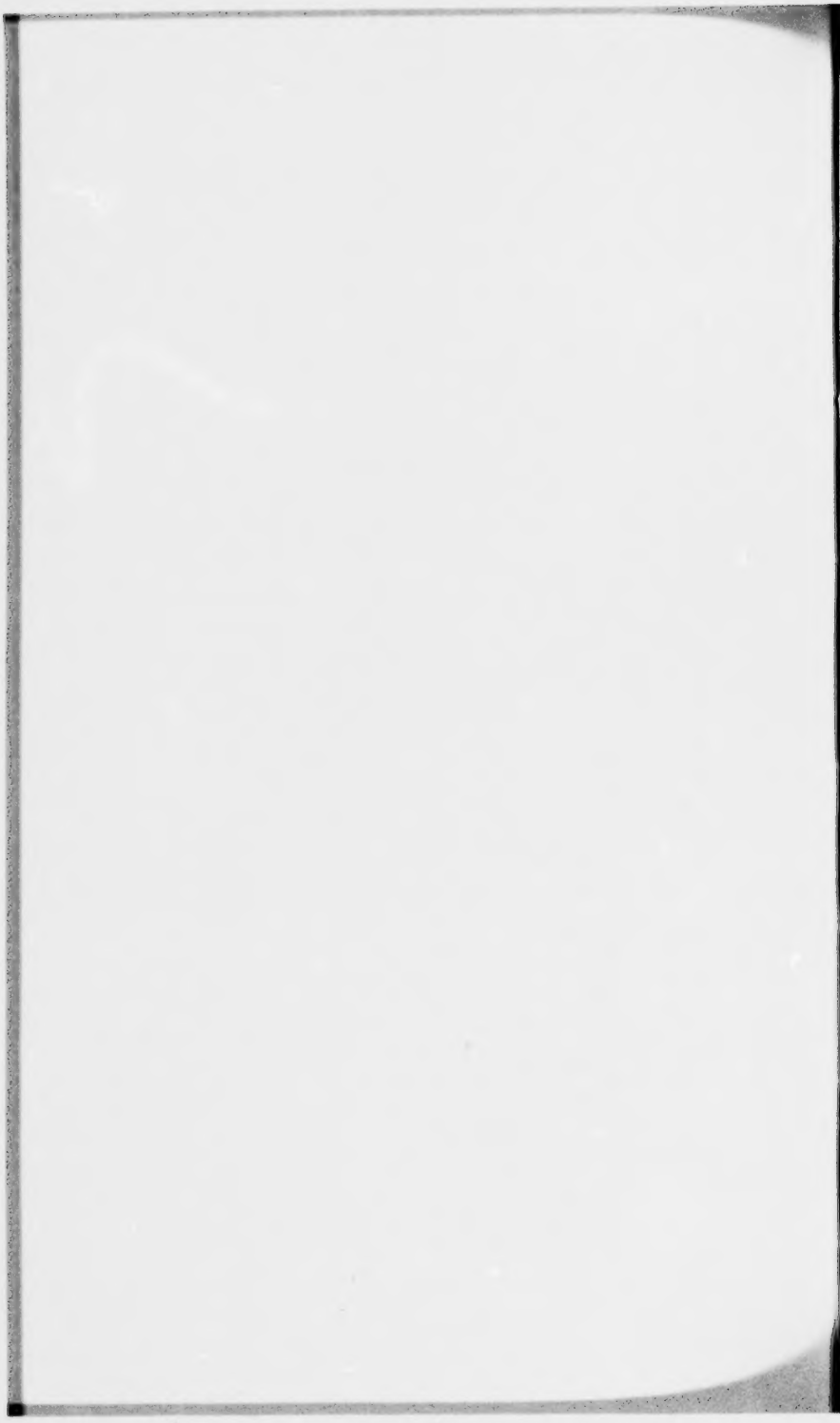

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INDEX.

	PAGE
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES INVOLVED	4
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT:	
POINT I.—It is a deprivation of liberty and property, without due process of law, under the 14th Amendment to the Constitution of the United States, for a state to permit a union to conduct picketing and other activities for almost three years where the objective sought is to coerce the employer to violate the law	10
POINT II.—Section 876-a of the Civil Practice Act is inapplicable since no labor dispute exists. Any attempt to apply that statute in this factual context is so unreasonable as to amount to a deprivation of petitioner's property in violation of the rights guaranteed him under the 14th Amendment to the Constitution of the United States	13
CONCLUSION	17
APPENDIX A	18
Constitution of the United States—Amendment XIV	18
Constitution of the State of New York—Article I, Section 17	18

PAGE

New York State Labor Relations Act, §703.—Rights of employees 18

New York State Labor Relations Act, §704.—Unfair labor practices 19

Civil Practice Act—876a. Injunction issued in labor disputes 21

APPENDIX B 25

Opinion 25

Opinion of Appellate Division, First Department 26

Opinion of Court of Appeals 29

Judgment 49

Remittitur 51

Order 54

Judgment 56

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Table of Cases.

	PAGE
Bond Stores, Inc. v. *Turner*, 258 App. Div. 769	15
Building Service Employees Local 262 v. *Gazzam*, 339 U. S. 532	11
Carpenters and Joiners Union v. *Ritter's Cafe*, 315 U. S. 722	11
Giboney v. *Empire Storage and Ice Co.*, 336 U. S. 490	11
Goodwins v. *Hagerdorn*, 303 N. Y. 300	12
Hughes v. *Superior Court of California*, 339 U. S. 460	11
International Brotherhood of Teamsters v. *Hanke*, 339 U. S. 470	11
Milk Wagon Drivers Union v. *Meadow Moor Dairies*, 312 U. S. 287	11
Plastic Calendering Corporation v. *Spilberg*, 121 N. Y. S. 2d 297, 305	15

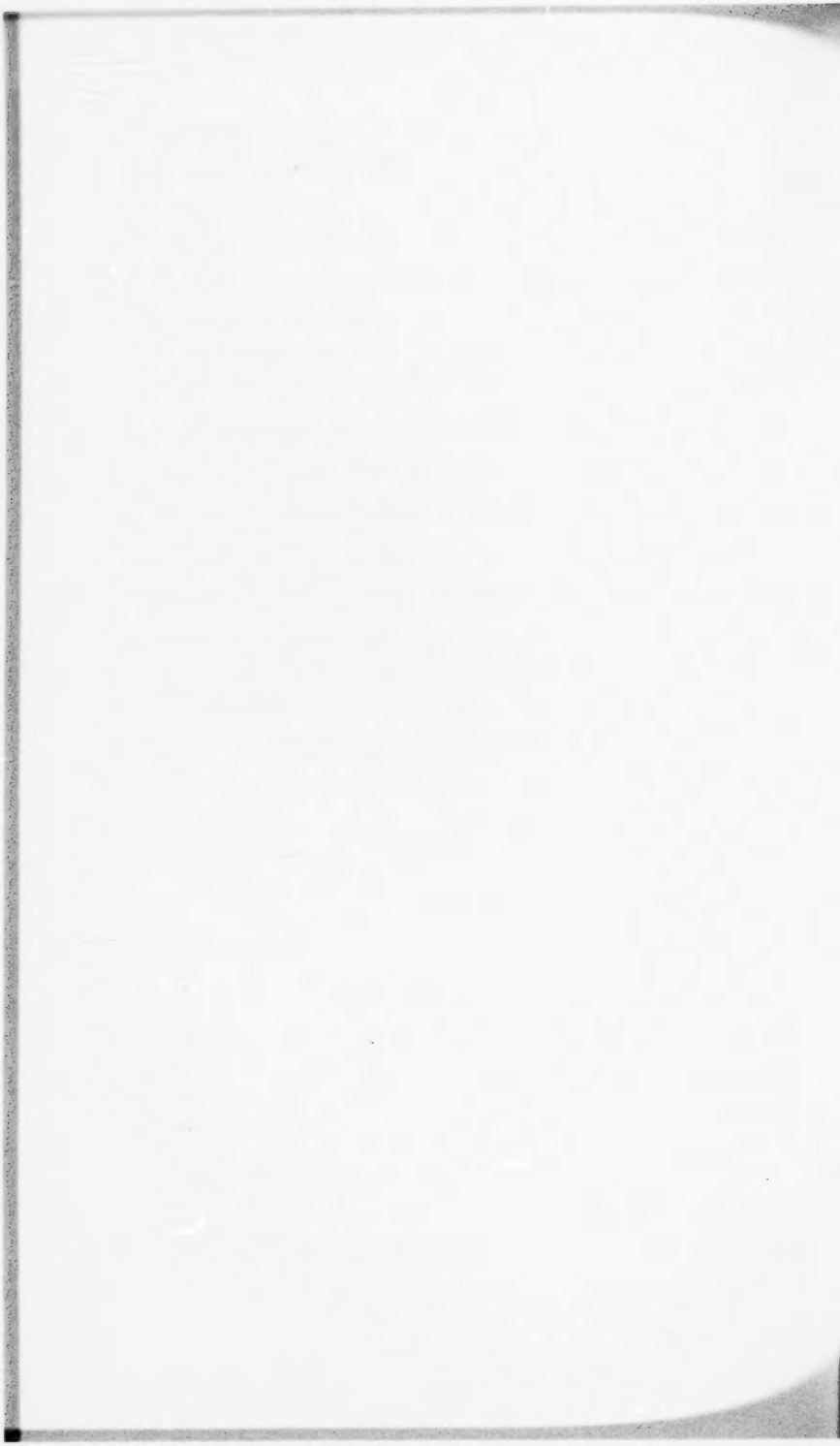
Statutes.

Constitution of the United States,
Amendment XIV 4, 8, 10, 13, 17, 18

Constitution of the State of New York,
Article I, Section 17 ..... 4, 6, 8, 18

New York State Labor Relations Act,
Section 703 ..... 4, 6, 8, 18
Section 704 ..... 4, 6, 8, 19

Civil Practice Act,
Section 876-a 4, 13, 14, 15, 21



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JOHN M. O'GRADY, individually and as President, and "JAMES DOE", name fictitious, true name unknown to plaintiff, individually and as Treasurer of the Wine and Liquor Store Employees Union, Local 122, A. F. of L., WINE AND LIQUOR STORE EMPLOYEES UNION, LOCAL 122, A. F. of L., and "JOHN DOE", "RICHARD ROE", "MICHAEL DOE", *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

Petitioner, Sydney J. Wood, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above entitled case on November 1, 1954.

Citations to Opinions Below.

The opinion of Mr. Justice Greenberg at Special Term (R. 322-327)[1] is not officially reported but can be found at 23 Labor Cases 67,696 and is printed in Appendix B hereto, *infra*, p. 25. The opinion of the Appellate Division (R. 373-390), *infra*, p. 26, is reported in 283 App. Div. 83. The opinion of the Court of Appeals of the State of New York, (certified copy of which is annexed to the Record on Appeal) printed in Appendix B hereto, *infra*, p. 29, is reported in 307 N. Y. 532.

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[1] Hereafter R. shall be used to refer to the Case on Appeal and the numbers shall refer to the folio numbers contained therein.

Jurisdiction.

The judgment of the Court of Appeals of the State of New York was entered on November 1, 1954 (Appendix B; p. 49, *infra*). Rehearing was denied on January 13, 1955.

A subsequent motion to amend the remittitur to show clearly the federal questions presented, or, in the alternative, for reargument to permit more explicit presentation of the federal questions involved was denied on March 10, 1955.

The jurisdiction in this Court is asserted on the authority of 28 U. S. C., Section 1257 (3).

The jurisdiction of this Court is invoked to safeguard the rights of petitioner to the equal protection of the laws and the right to own property and conduct a business without having to violate the law to do so pursuant to the guaranties in the 14th Amendment to the Constitution of the United States.

This proceeding was instituted by petitioner who sought to enjoin a union's activities on the grounds that the union's objective was illegal in that it sought to coerce the employer into violating the law. The Supreme Court of the State of New York, County of New York, dismissed petitioner's application. The Appellate Division of the Supreme Court of the State of New York, First Department, reversed the order of dismissal by a unanimous vote and ordered that an injunction be issued. The Court of Appeals of the State of New York reversed the order of the Appellate Division by a 4 to 3 vote dismissing petitioner's application for an injunction and reinstating the order of the Supreme Court which denied said application. A motion for reargument was denied by the Court of Appeals. A petition was filed seeking "amendment of the remittitur to show federal questions, or, in the alternative for reargument to permit more

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explicit presentation of federal questions" and it was denied on March 10, 1955.

Petitioner urged at oral argument before the Court of Appeals of the State of New York that one of his most basic property rights under the 14th Amendment to the Constitution of the United States—the right to do business without unlawful interference—would be confiscated and discarded if the relief sought were not granted. By a subsequent printed petition, the Federal Constitutional issues were further presented for the Court's consideration and were denied as stated above.

Questions Presented.

1. Whether it is not a deprivation of liberty and property, without due process of law under the 14th Amendment to the Constitution of the United States, for a State to permit a union which has picketed an employer for almost 3 years and which does not represent any of his employees to continue to picket *ad infinitum* in such circumstances that the internal laws of that State make it illegal for the employer to take any action whatsoever to mitigate or alleviate the economic harm flowing from such picketing.

2. Whether the equal protection of the laws clause in the 14th Amendment does not prohibit a State from interpreting its internal laws in such a way that a small business man can effectively be put out of business, without compensation and without wrongdoing on his part, while at the same time other laws of the State prohibit him from taking any action whatsoever to prevent or mitigate such an economic catastrophe.

Statutes Involved.

The statutory provisions involved are the 14th Amendment to the Constitution of the United States, U. S. C. Const. Amend. 14 Section 1; §876a of the Civil Practice Act of the State of New York; §17, Article I of the New York State Constitution; and §§703 and 704 of the N. Y. State Labor Law. They are printed in Appendix A, *infra*, pp. 18-24.

Statement of the Case.

The petitioner (hereinafter referred to as "Wood") is the sole proprietor of a retail liquor store located at 135 East 53rd Street, Borough of Manhattan, City and State of New York, wherein he employs three clerks as salesmen (R. 90, 107).

In October 1951 Wood was approached by a business agent for Local 122, Wine & Liquor Store Employees' Union A. F. of L. (hereinafter referred to as the "Union"). The business agent informed Wood that he was organizing liquor store employees and would like to enroll Wood's workers in the Union (R. 92).

Wood replied that whether his employees joined the Union was a matter for them to decide for themselves (R. 93).

Subsequently, this Union through its agents distributed Union literature among the employees and conferred with them at length, individually and in groups, extolling the virtues of this particular Union. *It is undisputed, however, that not one of Wood's employees has ever joined this Union, despite more than three years of exhortation, enticement and coercion* (R. 157-160). In addition, it is uncontroverted that no unfair labor practice charges have ever been filed against Wood, thus negating any inference of coercion on his part against the Union (R. 293-294).

On October 20, 1951, without any prior notice, the picket line was placed in front of Wood's premises. The pickets

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carried signs representing to the public that Wood was unfair to Union labor. They stopped all trucks attempting to deliver merchandise and exhorted the drivers to refuse to cross their picket line. As a result of their actions, all deliveries of merchandise from wholesale distributors to Wood's place of business were cut off (R. 97-100).

This situation continued for almost two years and terminated only after an order of the Appellate Division of the Supreme Court of the State of New York enjoined the picketing and other related activities of this Union. Immediately after the judgment of reversal was announced by the Court of Appeals of the State of New York, this Union recommenced its picket line at Wood's place of business and such picket line has been maintained continuously to the present, again cutting off all deliveries of merchandise from wholesale distributors.

After the picketing was first commenced by this Union in 1951, Wood promptly petitioned the New York State Labor Relations Board for an election to determine whether this Union represented a majority of his employees. The Union appeared and conceded a complete lack of representation whereupon the petition was dismissed pursuant to the Board's policy of denying such applications where the Union admits lack of representation (R. 43-51).

The Chairman of the Board dissented on the ground that there is no practical distinction between "organizational picketing" and "recognition picketing" (R. 52-53). Wood was thus placed in a desperate economic situation without further recourse to the State Labor Relations Board.

The Union had cut off all deliveries of merchandise to his store and was forcing him to incur great additional expense and inconvenience in his efforts to replenish his diminishing stocks. In addition, their picket line was cutting deeply into the patronage the store formerly enjoyed.

In spite of this enormous economic pressure, Wood could not negotiate with the Union because it did not represent his employees. Similarly, he could not force his employees to join the Union thus enabling him to deal with it since such action would be a direct violation of Section 17, Article I of the New York State Constitution, and Sections 703 and 704 of the New York Labor Law, which make it an unfair labor practice for an employer to interfere with his employees free selection of their bargaining representative.

In an attempt to alleviate the impact of this economic pressure upon his business, Wood arranged with some of his wholesale distributors (at great additional expense and inconvenience) to ship merchandise ordered by him to the Manhattan Storage Warehouse Company, located at 52nd Street and Third Avenue, Borough of Manhattan, City and State of New York. Shortly thereafter, he was advised by the officials of the Manhattan Storage Warehouse Company that they could no longer store his merchandise. They stated that they had been approached by the Union's agents who threatened them with labor trouble in their own organization unless they ceased doing business with Wood (R. 101-102).

Thereupon, Wood contracted with Riley's Storage and Warehouse Co., Inc. of 521 Bergen Avenue, Borough of Bronx, City and State of New York for storage services, again at additional expense and inconvenience.

The Union thereupon immediately proceeded to intimidate Riley's as it had previously intimidated Manhattan. It demanded that Riley's disclose to them the names of the distributors who were shipping merchandise to Wood. Riley's refused to divulge this information on the grounds that, as a public warehouse, such confidential information could not be disclosed without the consent of the customer (R. 165).

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The Union thereupon established a picket line in front of Riley's premises. Riley's employees were all members of Local 814 of the Teamster's Union and they refused to cross the picket line established by Local 122. As a result, Riley's was completely shut down on March 13, 1953. On the following day the warehouse employees resumed general unloading operations. However, a picket line was maintained in front of Riley's premises for the next four days and during this period the warehouse employees refused to handle any merchandise stored by Wood. In addition, the pickets stopped all trucks delivering merchandise to Riley's and would not allow the delivery of merchandise consigned to Wood (R. 162-165; 174-175).

The picket line at Riley's was removed on March 18, 1953. After that date, however, the Union posted "lookouts" at this warehouse and stopped every liquor delivery truck at the warehouse and "persuaded" the drivers to refuse to deliver merchandise consigned to Wood, with the result that Wood did not receive any shipments of liquor through normal channels at any location from March 2, 1953 up to the time the Appellate Division granted him relief from this economic strangulation (R. 166-168).

In addition, the Union induced employees of wholesale liquor distributors to refuse to process any orders for Wood and thereby succeeded in blocking the shipment of merchandise ordered by Wood at its point of origin (R. 181-183; 319-321). In this manner, Wood was thwarted in his attempts to obtain liquor through normal commercial channels even though he was willing to pick up the merchandise in his own car. This practice was also reinstated after the Court of Appeals of the State of New York dismissed the injunction so that Wood is again unable to obtain any merchandise through normal commercial channels. In

these circumstances there can be little doubt that Wood is being pushed inexorably toward economic oblivion.

As a result of these activities, Wood is now faced with the dilemma of either going out of business or contracting with the Union which does not represent any of his employees. The latter course of conduct is clearly a violation of law expressly condemned by Section 17, Article I of the New York State Constitution and Section 703 and 704 of the New York State Labor Law. There is one other course of action available to Wood and that is to attempt to coerce his employees into joining the Union so that he may consummate a contract with it. But that too is a clearly illegal act expressly condemned by the above mentioned laws.

Your petitioner is thus placed between Scylla and Charybdis by the legal interpretation placed upon this state of facts by the Court of Appeals of the State of New York. Wood is told that a valuable property right—the right to conduct a business—which has taken a lifetime of personal effort to build and the investment of all his capital, may be confiscated and destroyed without just compensation. This stark anomaly can be brought into even sharper focus when placed against the circumstantial background wherein companion laws of the State of New York forbid Wood from taking any steps to alleviate or mitigate this situation. Even more repugnant is the fact that an economic disaster of this type is condoned by the Law in circumstances in which the victim is concededly an innocent party and not chargeable with any wrongdoing or misconduct. Certainly, this is a basic deprivation of personal liberty and property without due process of law and most certainly without the equality of protection of the laws guaranteed to the individual by the 14th Amendment of the Constitution of the United States.

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The original application for an injunction was denied at Special Term on the ground that the Union's conduct was merely "organizational" and as distinguished from "recognition" picketing and therefore not enjoinable (R. 322-327).

The Appellate Division unanimously reversed that decision and found that the picketing was for an unlawful objective in that it sought by coercion to force the employer to violate the State Labor Relations Act and the State Constitution by compelling his employees to join this Union against their will.

The Court of Appeals of the State of New York reversed the judgment of the Appellate Division by a 4 to 3 decision wherein the majority found for the first time, as a finding of fact, that the employer had coerced his employees and committed unfair labor practices in spite of the fact that no such claim or charge had ever been filed against this employer in the three years since this Union began its activities at his place of business.

Based on these factual findings the majority concluded that the Union had a right to continue to picket.

The dissent points out the illegal objective sought by this picket line and recognizes the anomalous and hopeless position of the small business man in such a predicament and concludes that the injunction should lie to prevent the irreparable injury and destruction of property accruing to this employer who is powerless to take any action to alleviate the economic pressure except by violating the law.

REASONS FOR GRANTING THE WRIT.

POINT I.

It is a deprivation of liberty and property, without due process of law, under the 14th Amendment to the Constitution of the United States, for a state to permit a union to conduct picketing and other activities for almost three years where the objective sought is to coerce the employer to violate the law.

This case raises important and novel Federal questions which have never been passed on by this Court concerning the meaning and scope of the constitutional safeguards embodied in the 14th Amendment guaranteeing that no citizen will be deprived of liberty and property without due process of law, and that every citizen will be accorded the equal protection of the laws. National questions of policy affecting fundamental constitutional rights have, of necessity, been decided in this case. The issues at stake will determine the ultimate fate of enormous numbers of small businessmen in similar situations.

This case also involves questions concerning the power of a State to attach onerous and, in fact, impossible conditions to the right to conduct a business.

It is also noteworthy that 13 Judges of the State of New York have passed on this case, and that 8 of these Justices were of the opinion that the injunction sought herein should be granted, and only 5 opposed the granting of the relief sought.

The practical result of the judgment of the State Court in the case *sub judice* is to force the Petitioner into bankruptcy, or into violating the laws of the State to stay in business. *No other alternative exists.* This Court, as did

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the Court of Special Term, can certainly take judicial notice of the stark realities of industrial life wherein a picket line is tantamount to an iron curtain about the premises of an employer which Union truckdrivers and deliverers will not pierce and which will ultimately destroy patronage.

There is no question that picketing is an established institution in the industrial mores of our country, condoned on policy considerations motivated by a desire to more equitably equate the respective economic strength of employers and employees. However, limitations on this right have been exerted almost from the beginnings of the Wagner Act, and have been expanded in scope continuously to the present. Thus, in *Milk Wagon Drivers Union* v. *Meadow Moor Dairies,* 312 U. S. 287, the Court sustained an injunction against picketing which was enmeshed in a background of violence. In *Carpenters and Joiners Union* v. *Ritter's Cafe,* 315 U. S. 722, an injunction was issued and sustained against picketing of an establishment which had no business connection with the business actually involved in the industrial dispute, except that the same employer owned both businesses. In the more recent case of *Hughes* v. *Superior Court of California,* 339 U. S. 460, this Court stated flatly that picketing is not an absolute right, and sustained an injunction on the grounds that the objectives sought were improper. For further cases enjoining picketing because of the unlawful objections sought, see *International Brotherhood of Teamsters* v. *Hanke,* 339 U. S. 470, where the picketing had as its purpose the unionization of an establishment owned and operated by the employer himself; *Building Service Employees Local 262* v. *Gazzam,* 339 U. S. 532, where the Union's objective was to coerce the employers into coercing the employees into joining a Union; *Giboney* v. *Empire Storage and Ice Co.,* 336 U. S. 490,

where the objective was to coerce the employer to violate the Anti-Trust laws.

The highest Court of the State of New York has also enjoined picketing for an unlawful objective where the picket line sought to coerce an employer into recognizing a particular union during the pendency of a Labor Board representation hearing, *Goodwins* v. *Hagerdorn*, 303 N. Y. 300. The list of cases in which the Courts have placed limitations upon the right of picketing could be expanded *ad infinitum*, and there does not seem to be any question at this late date that such limitations do exist. Petitioner, in this case, merely seeks to limit the Union's activities in so far as they operate to unlawfully deprive him of his property within the purport of the 14th Amendment.

The decision of the highest Court of the State of New York now leaves small businessmen throughout the State at the absolute mercy and caprice of any individual or group who may possess a Union charter, regardless of whether or not any employees have any interest in their organization. A complete carte blanche is given any one purporting to be a Union representative to strike a blow at the very vitals of any small business operation unless and until the employer capitulates to their demands in spite of the sound laws of the State purporting to give employees freedom of choice in selecting their bargaining representative, and in spite of the fact that the employer must violate the law to take any step to alleviate the economic catastrophe which has been imposed by him.

Wood's three employees have never at any time joined this Union and, in fact, have manifested a very marked hostility toward it in spite of almost three years of continuous coercion, exhortation and enticement. (See R. 157-160; also, see Exhibits "1" and "2" Petitioner's Motion for Reargument, Court of Appeals, pp. 10-17.) Wood's small

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business has now been reduced to a shadow of its former operation and, still, the Court says he can take no steps, or do anything at all to attempt to correct it. If this Court does not grant the relief sought herein, Wood will certainly go out of business within a relatively short time; thus, he will have been deprived of a valuable piece of property under circumstances in which he is admittedly an innocent third party caught in the industrial maelstrom raging between his employees and this Union. Certainly, this is an unlawful deprivation of property within the meaning of the 14th Amendment to the Constitution of the United States.

POINT II.

Section 876-a of the Civil Practice Act is inapplicable since no labor dispute exists. Any attempt to apply that statute in this factual context is so unreasonable as to amount to a deprivation of petitioner's property in violation of the rights guaranteed him under the 14th Amendment to the Constitution of the United States.

The determination by the State Court that both the means employed and the objectives sought by this Union are lawful under the provisions of Section 876-a of the New York Civil Practice Act is so arbitrary and unreasonable when viewed against the background of the factual situation as to amount to deprivation of property without due process of law. This Union's picketing did not arise from any controversy between Wood and the Union, or between the Union and Wood's employees concerning terms and conditions of employment. Wood has never been presented with any grievances or demands as to wages, hours,

or working conditions, and the Union does not now claim to represent any of Wood's employees. Nevertheless, the State Court found that a labor dispute existed within the meaning of the Statute.

Paragraph 10 of Section 876-a of the Civil Practice Act describes a labor dispute as follows:

> "(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee."

The very word "dispute" connotes the existence of some sort of controversy. The facts in the instant case fail to point to any side as opposed to each other as to wages, hours, working conditions, or any other situation arising as the result of the employer-employee relation. As a matter of fact, Wood's employees enjoy better wages, working conditions, and fringe benefits than this Union's established standard in the industry, and has enjoyed such standards long before this Union approached Wood's premises.

Petitioner's employees have clearly expressed their unqualified refusal to become affiliated with the defendant (See Exhibits "1" and "2" Petitioner's Motion for Reargument, Court of Appeals, pp. 10-17); they have not brought to the Petitioner any grievance concerning their relationship of employer-employee. If no controversy exists between Wood and his employees, and between Wood and the Union, it would seem apparent that no labor dispute

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exists. This was succinctly stated by Mr. Justice Christ in *Plastic Calendering Corporation* v. *Spilberg*, 121 N. Y. S. 2d 297, at page 305:

> "* * * A labor dispute implies the existence of a controversy in the area of labor relations. There can be no controversy unless there are parties who occupy the relationship one to the other of disputants. Until the employer has been presented with labor's demands or informed of its grievances it cannot be known whether any controversy does exist in fact. Definite and orderly procedure contemplates a presentation of demands followed by discussion as the means of ascertaining whether a controversy actually is present. A reversal of this order of procedure to defeat the doctrine of the *Goodwins, Inc.* case * * * should not be fostered."

In *Bond Stores, Inc.* v. *Turner*, 258 App. Div. 769, the Court held that evidence showing unwillingness of the employees to join a particular union established the fact that the Union's picketing was unlawful and the Court affirmed the issuance of an injunction, rejecting the defendant's contention that there was a labor dispute involved. Where the employees clearly do not wish representation forced upon them, Section 876-a does not prohibit a restraining order from being issued against the Union.

Where no grievances have been presented to the employer by his employees, and the employees have clearly rejected the Union, the employer may not deal with the Union under the laws of the State until such time as the Union represents a majority of these employees. Common sense and the basic concepts of fair play, liberty and property as enunciated in the Constitution of the United States would seem to compel the issuance of an injunction in these circumstances.

The finding by the State Court that such a labor dispute does exist, is without factual basis and such determination can only be classified as arbitrary and unreasonable, the effect of which is to deprive Petitioner of a valuable property (his business) without due process of law.

The State Court's decision goes further, and holds that so-called "organizational" picketing may be continued to the end of time, if necessary. The realities of this case can leave no doubt but what the Union seeks is a contract with this employer. The means utilized (picketing of premises; picketing at distant warehouses where the employer stores goods; blacklisting him in the industry so that he cannot obtain merchandise from distributors; blacklisting him amongst affiliated Unions so that distributors' employees refuse to package goods consigned to him, etc.) are all methods directed towards coercion against the *employer*. The ultimate objective of placing such coercion on the employer is, of course, to force him to coerce his employees into joining this Union. Certainly, picketing a storage warehouse many miles removed from his premises is not an attempt to educate and organize his employees! The State Court has now placed its sanction on such conduct and added the further coercive ingredient of time, by holding that such activities can continue *ad infinitum*. As time marches on the coercive nature and impact of these activities will, of necessity, increase. As Petitioner's business is decimated day by day, the coercive effect of the Union's activities increases proportionately. As time passes, the Petitioner becomes more desperate in his desire to save his business and searches for all possible means to extricate himself from this dilemma, but his search is fruitless because there is no escape within the law. The only possible escape is the commission of an unlawful act, in that he will coerce his employees into

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joining this Union against their will, thus enabling him to sign a contract with it, the cost of which would be nominal since his wages and fringe benefits have been for a long time in excess of this Union's standards. It would appear almost elementary that sound government cannot rest on judicial decisions which encourage and, in fact, force violations of the legislature's laws.

To force this Petitioner to the commission of an unlawful act to save his business is a violation of the rights guaranteed our citizens by the 14th Amendment to the Constitution of the United States.

Conclusion.

For all of the foregoing reasons, it is submitted that a writ of certiorari be granted.

Respectfully submitted,

BANDLER & KASS,
Attorneys for Petitioner.

JULIUS KASS,
MAURICE H. GOETZ,
Of Counsel.

Dated: April 11, 1955.

APPENDIX A.

CONSTITUTION OF THE UNITED STATES.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF NEW YORK.

Article I, Section 17:

* * * * *

Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.

NEW YORK STATE LABOR RELATIONS ACT, §703.

Rights of employees.

Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers, but nothing contained in this article shall be interpreted to prohibit employees from exercising the right to confer with their employer at any time, providing that during such conference there is no attempt by the employer, directly or indirectly, to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by this section.

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NEW YORK STATE LABOR RELATIONS ACT, §704.

Unfair labor practices.

It shall be an unfair labor practice for an employer:

1. To spy upon or keep under surveillance, whether directly or through agents or any other person, any activities of employees or their representatives in the exercise of the rights guaranteed by section seven hundred three.

2. To prepare, maintain, distribute or circulate any blacklist of individuals for the purpose of preventing any of such individuals from obtaining or retaining employment because of the exercise by such individuals of any of the rights guaranteed by section seven hundred three.

3. To dominate or interfere with the formation, existence, or administration of any employee organization or association, agency or plan which exists in whole or in part for the purpose of dealing with employers concerning terms or conditions of employment, labor disputes or grievances, or to contribute financial or other support to any such organization, by any means, including but not limited to the following: (a) by participating or assisting in, supervising, controlling or dominating (1) the initiation or creation of any such employee organization or association, agency, or plan, or (2) the meetings, management, operation, elections, formulation or amendment of constitution, rules or policies, of any such employee organization or association, agency or plan; (b) by urging the employees to join any such employee organization or association, agency or plan for the purpose of encouraging membership in the same; (c) by compensating any employee or individual for services performed in behalf of any such employee organization or association, agency or plan, or by donating free services, equipment, materials, office or meeting space or anything else of value for the use of any such employee organization or association, agency or plan; provided that,

an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

4. To require an employee or one seeking employment, as a condition of employment, to join any company union or to refrain from forming, or joining or assisting a labor organization of his own choosing.

5. To encourage membership in any company union or discourage membership in any labor organization, by discrimination in regard to hire or tenure or in any term or condition of employment: Provided that nothing in this article shall preclude an employer from making an agreement with a labor organization requiring as a condition of employment membership therein, if such labor organization is the representative of employees as provided in section seven hundred five.

6. To refuse to bargain collectively with the representatives of employees, subject to the provisions of section seven hundred five.

7. To refuse to discuss grievances with representatives of employees, subject to the provisions of section seven hundred five.

8. To discharge or otherwise discriminate against an employee because he has signed or filed any affidavit, petition or complaint or given any information or testimony under this article.

9. To distribute or circulate any blacklist of individuals exercising any right created or confirmed by this article or of members of a labor organization, or to inform any person of the exercise by any individual of such right, or of the membership of any individual in a labor organization for the purpose of preventing individuals so blacklisted or so named from obtaining or retaining employment.

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10. To do any acts, other than those already enumerated in this section, which interfere with, restrain or coerce employees in the exercise of the rights guaranteed by section seven hundred three.

CIVIL PRACTICE ACT.

§876-a. *Injunction issued in labor disputes.*

1. No court nor any judge or judges thereof shall have jurisdiction to issue any restraining order or a temporary or permanent injunction in any case involving or growing out of a labor dispute, as hereinafter defined, except after a hearing, and except after findings of all the following facts by the court or judge or judges thereof to be filed in the record of the case:

(a) That unlawful acts have or a breach of any contract not contrary to public policy has been threatened or committed and that such acts or breach will be executed or continued unless restrained;

(b) That substantial and irreparable injury to complainant's property will follow unless the relief requested is granted;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial thereof than will be inflicted upon defendants by the granting thereof;

(d) That complainant has no adequate remedy at law;

(e) That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection; and

(f) That no item of relief granted prohibits directly or indirectly any person or persons from doing, whether singly or in concert, any of the following acts:

(1) Ceasing or refusing to perform any work or to remain in any relation of employment;

(2) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any agreement, undertaking or promise;

(3) Paying or giving to, or withholding from, any person any strike or unemployment benefits or insurance or other moneys or things of value;

(4) By all lawful means aiding any person who is being proceeded against in, or is prosecuting any action or suit in any court of the United States or of any state;

(5) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, picketing, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace;

(6) Ceasing to patronize or to employ any person or persons;

(7) Assembling peaceably to do or to organize to do any of the acts heretofore specified or to promote lawful interests;

(8) Advising or notifying any person or persons of any intention to do any of the acts heretofore specified;

(9) Agreeing with other persons to do or not to do any of the acts heretofore specified;

(10) Advising, urging or inducing without fraud, violence or threat thereof, others to do the acts heretofore specified;

(11) Doing in concert of any or all of the acts heretofore specified on the ground that the persons engaged therein constitute an unlawful combination or conspiracy or on any other grounds whatsoever.

2. Such hearings shall be held only after a verified complaint and a verified bill of particulars specifying in detail the time, place and the nature of the acts complained of

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and the names of the persons alleged to have committed the same or participated therein have been served and after due and personal notice, in such manner as the court shall direct, has been given to all known persons against whom relief is sought and also to the public officers charged with the duty to protect the complainant's property. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination and testimony in opposition thereto, if offered, and no affidavits shall be received in support of any of the allegations of the complaint.

• • • • •

4. No injunctive relief shall be granted to any plaintiff who has failed to plead and prove compliance with all obligations imposed by law which are involved in the labor dispute in question, or who has failed to allege and prove that he has made every reasonable effort to settle such dispute either by negotiation or with the aid of any machinery of mediation or voluntary arbitration, provided for by law or contract between the parties.

• • • • • •

10. When used in this section, and for the purpose of this section: (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation, or who are employees of one employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is between one or more employers or associations of employers and one or more employees or associations of employees; between one or more employers or associations of employers and one or more employers or associations of employers; or between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of

"persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it and if he or it is engaged in the industry, trade, craft or occupation in which such dispute occurs, or is a member, officer or agent of any association of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee.

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APPENDIX B.

Opinion.

Justice Henry Clay Greenberg.

Special Term Part III.

Wood v. *O'Grady*—Assuming that a labor dispute is not involved and that therefore the complaint is not required to comply with the provisions of section 876-a of the Civil Practice Act, plaintiff nevertheless has failed to establish that he is entitled to an injunction restraining peaceful picketing. The record fails to disclose that there were any arrests, that any violence was practiced by any of the pickets, that any of the customers of the plaintiff were intimidated or prevented from coming into plaintiff's place of business, that the signs carried by the pickets contained any misstatement of fact, or that the plaintiff suffered by loss of business because of the picketing by one or two pickets in front of his place of business. Moreover, there is no evidence in the case that the picketing was for an unlawful objective. On the contrary, the believable evidence in the case is to the effect that the defendants were solely seeking to organize the employees of the plaintiff. This is a lawful labor objective even though there was no labor dispute between the parties as defined in the prevailing authorities. True it is that at least one of the storage warehouses to which liquor had been consigned by distributors for the plaintiff had for a period of time been picketed also, but there is no claim here that this picketing continues at the present time, and furthermore, the warehouse makes no complaint in this action of any picketing. The most that can be deduced from the record is that some inconvenience has attended plaintiff's purchase of liquor from distributors and wholesalers but such inconvenience as is present does not confer upon the plaintiff the right to restrain all picketing. *Goodwins, Inc.* v. *Hagedorn* (303 N. Y., 300), is not here applicable. After the Court of

Appeals sustained the complaint in the *Goodwin's* case (*supra*) this very court tried the case, and on the basis of the determination made by the Court of Appeals it was concluded that plaintiff was entitled to an injunction restraining all picketing. That decision was reached because (1) the picketing was for the purpose of obtaining an exclusive contract as against rival unions, and (2) representation proceedings were pending before both the federal and state Labor Relations Board. In the instant case, however, there was no attempt by the defendants to obtain an exclusive contract, and second, no representation proceedings are pending before the labor boards (see *LaManna* v. *O'Grady*, 278 App. Div., 77), where the Appellate Division, in this department, permitted picketing in a situation almost identical with that which prevails here. Accordingly, judgment is directed in favor of the defendants dismissing the complaint on the merits. Settle findings of fact, conclusions of law, and judgment.

Opinion of Appellate Division, First Department.

Per Curiam. Plaintiff is the proprietor of a retail liquor store located in the borough of Manhattan, employing three clerks as salesmen. In October, 1951, he was approached by a business agent for defendant Local 122, Wine and Liquor Store Employees' Union A. F. of L. (hereafter referred to as the Union) and was informed that the agent would like to enroll Wood's clerks in the union. The employees of plaintiff declined to join. Thereupon and in October, 1951, a picket line was placed in front of plaintiff's premises. The pickets carried signs intimating to the public that Wood was unfair to union labor. Various efforts were thereafter made without avail to get these employees to join the union. It is undisputed, however, that no one of Wood's employees has yielded despite almost two years of exhortation. The picket line has been maintained outside of plaintiff's store during all this time.

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On October 30, 1951, Wood petitioned the New York State Labor Relations Board for an election to determine whether the union represented a majority of his employees. The union made no claim of representing any of the employees and allegedly made no demand for a contract. On the ground that the union was engaged merely in organizational activity, plaintiff's petition was dismissed by a vote of two to one, the chairman of the board dissenting on the ground that there is little difference between organizational picketing and picketing by a union which demands a contract.

Because plaintiff could not get deliveries of merchandise to his store, he arranged at considerable additional expense with some of his wholesale distributors to ship merchandise to a warehouse. Following visits made by defendants' agents, officials of the warehouse company would not allow storage of plaintiff's merchandise. Later, plaintiff contracted with another warehouse company for storage service. Defendants established a picket line in front of these premises. A few days later, they withdrew the picket line, but it is claimed that thereafter lookouts persuaded drivers of every truck with merchandise consigned to plaintiff not to deliver goods to that warehouse.

As a result of these activities, plaintiff is faced with the alternative of either going out of business or contracting with a union that does not represent any of his employees, the latter course being in violation of section 17 of article I of the New York State Constitution and sections 703 and 704 of the New York State Labor Law.

After a trial, held in June, 1953, plaintiff's complaint seeking to enjoin the union from picketing plaintiff's premises was dismissed upon the merits on the ground that the union was engaged merely in organizational activity.

Plaintiff has never been presented with any grievances as to wages, hours or working conditions by his employees. The union has never made any claim of representing any of plaintiff's employees. From this record, it is abundantly clear that plaintiff's employees are unwilling to be represented by defendant union. Up to the time of the trial,

the "organizational" activities of the union had continued for a period of well over a year and a half, but had been wholly unsuccessful. Such activities are still continuing with no apparent success.

The conclusion is inevitable that the picketing here included an unlawful objective in that it sought to coerce the employer into signing a contract with defendant union. As defendant union was picketing to exert economic pressure against the employer by compelling him to have his employees join defendant union against their will in violation of the State Labor Relations Act, or in the alternative by driving plaintiff out of business, plaintiff is entitled to the relief which he seeks. The picketing being for an unlawful objective an injunction will lie. (*Goodwins, Inc.* v. *Hagedorn*, 303 N. Y. 300; *Metropolis Country Club* v. *Lewis*, 202 Misc. 624, affd. 280 App. Div. 816; *Haber & Fink* v. *"Jones"*, 277 App. Div. 176; *Plastic Calendering Corp.* v. *Spilberg*, 121 N. Y. S. 2d 297, 304.) In the *Metropolis* case at page 626, the court in an analogous state of facts said: "Let it be said at the outset that on the papers submitted a labor dispute within the ordinary comprehension of the term does not exist between the plaintiff and its employees. The plaintiff is and has been willing to accede to the legitimate wishes of its employees in respect to their representation. The plaintiff has twice sought a certification under the Labor Law, so that the employees might elect a bargaining agent of their own choosing. Apparently, however, the defendant unions do not feel that the time is propitious for such a free election on the part of the plaintiff's employees. The court further makes the presumptive determination necessary to grant plaintiff's motion for temporary relief, that even within the extended statutory connotation of the term, a labor dispute does not exist, for the reason the primary objective of the picketing here involved was not to organize plaintiff's employees, but to disorganize the plaintiff under economic pressure, to the end that the plaintiff would recognize or cause recognition to be given to the defendant unions."

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The judgment should be reversed and defendants should be enjoined from engaging in any form of picketing for a period of six months. After that time if there is some truthful information which defendants wish to impart to the public by picketing, they may apply to Special Term for a modification of the injunction to permit picketing which is specified and proper, on condition that it be conducted at such times and in such a way as not to interfere with plaintiff's receipt of supplies through ordinary channels of distribution (*La Manna* v. *O'Grady*, 278 App. Div. 77, 79). Settle findings accordingly.

PECK, P. J., DORE, COHN, BREITEL and BASTOW, JJ., concur.

Judgment unanimously reversed and defendants enjoined from engaging in any form of picketing for a period of six months. Settle order in accordance with the opinion herein.

Opinion of Court of Appeals.

DYE, J. In this appeal we deal with the propriety of an injunction issued by the court below to restrain peaceful organizational picketing because such picketing included "an unlawful objective * * * by exerting economic pressure".

Section 876-a of the Civil Practice Act (L. 1935, ch. 477) declares, as a matter of State policy, that injunctions may not issue "in any case involving or growing out of a labor dispute" except after a hearing and after a finding of fact in the language of the statute that "unlawful acts have been * * * threatened or committed" which "will be executed or continued unless restrained" (subd. 1, par. [a] causing "substantial and irreparable injury to complainant's property" (subd. 1, par. [b]). Even then, the restraint must not interfere with certain recognized rights, particularly the publication of the facts in any dispute by picketing not involving "fraud, violence or breach of the peace" (subd. 1, par. [f], cl. [5]). The Legislature, in

carefully chosen language, defined a labor dispute as one between "persons who are engaged in the same industry, trade, craft or occupation" (subd. 10, pars. [a], [b]) which "includes any controversy concerning terms and conditions of employment * * * or representation * * * or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee" (subd. 10, par. [c]).

The labor policy thus embedded in our statutory law stated nothing new or revolutionary. Over a long period of years this court has painstakingly evolved a pattern of decisional law repudiating the use of an injunction to restrain peaceful picketing in labor disputes which is too well known to warrant repeating here (*National Protective Assn.* v. *Cumming*, 170 N. Y. 315; *Interborough R. T. Co.* v. *Lavin*, 247 N. Y. 65, 74; *Stillwell Theatre, Inc.* v. *Kaplan*, 259 N. Y. 405; *J. H. & S. Theatres, Inc.* v. *Fay*, 260 N. Y. 315; *Nann* v. *Raimist*, 255 N. Y. 307; *Exchange Bakery & Restaurant, Inc.* v. *Rifkin*, 245 N. Y. 260).

In such a setting, it naturally followed that when the constitutionality of Section 876-a was challenged, it would be upheld (*Goldfinger* v. *Feintuch*, 276 N. Y. 281) and that it would be applied, even though the disputants do not stand in relation of employer and employee (*May's Furs & Ready-to-Wear, Inc.* v. *Bauer*, 282 N. Y. 331), and that if the acts of the unions "have any reasonable connection with wages, hours of employment, health, safety, the right of collective bargaining, or any other condition of employment or for the protection from labor abuses, then the acts are justified" (*Opera on Tour, Inc.* v. *Weber*, 285 N. Y. 348, 355).

The long history of controversial labor relations in this State is replete with instances of inconvenience to the employer, but it does not follow that at this late date such a consequence without more can be labeled "an unlawful objective".

As we view this record, the incidents complained of do not constitute an unlawful objective but at most amount

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to no more than the consequences frequently accompanying peaceful picketing in a labor dispute.

Briefly stated, the evidence establishes the plaintiff as the sole licensee and proprietor of a retail liquor store doing business under the name and style of 53rd Street Subway Liquor Store located at 135 East 53rd Street, New York City; that he employs, among others, three sales clerks. The defendant, Wine and Liquor Store Employees Union, Local 122, is an affiliate of the American Federation of Labor and represents, as bargaining agent, wine and liquor store clerks in New York City. For convenience, the plaintiff and defendant will hereinafter be referred to as "employer" and "union" respectively.

Beginning in October, 1951, the union undertook a campaign to enlist nonunion liquor store clerks into its membership which, we may assume, was preparatory to representing them as bargaining agent in negotiating with employers for employment contracts. Preliminary to commencement of solicitation, union representatives went to the employer, as was their custom, and advised him of the proposed organization campaign and their intention to solicit his sales clerks to join their union. They did not at that time or any other time present him with a collective contract or demand that he sign such a contract with them. The employer not only rejected the proposal for a union shop, but stated affirmatively that he was not interested in the union and if any of his workers signed up to join "they are not going to work in this store" and "he would put them out on the street with you". Under all the circumstances, it is clear that a statutory labor dispute is present here.

Picketing commenced October 20, 1951, the picket line consisting of one or two pickets stationed in front of the employer's store and carrying a placard bearing the legend: "The employees of this store are non-union. Please do not patronize this non-union store. We are members of the American Federation of Labor, Local 122 of A. F. L." The truthfulness of this legend is not challenged. The record is barren of any instance of violence or disorder on the part of the pickets but does contain testimony that the

employer frequently indulged in loud and abusive talk reflecting on the integrity of the union and the individual pickets; that he broomed the sidewalk in such a way as to scatter the sweepings around the feet of the pickets and, with an upward gesture toward the pickets, was heard to say in a loud voice to be overheard by persons in the vicinity, "I have to get rid of this filth". There is other evidence not denied by Wood that the employees were coerced with threats of dismissal into not joining the union. None of the workers joined, although one at least indicated a favorable attitude but refrained, due to the fear of dismissal.

Implicit in the decision at Special Term is the finding that by such comment and attitude the employer attempted "directly or indirectly, to interfere with, restrain or coerce employees in the exercise of [their] rights" (Labor Law, §§703-704), which, under all the circumstances of this case was enough to warrant that court in denying an injunction.

To justify the contention that the picketing was in fact directed against him, the employer adduced testimony to show that wholesale deliveries of merchandise to his store were cut off because their truck drivers refused to cross the picket line with the result that the employer had to get his merchandise from the wholesaler or warehouse himself which, in any view, amounts to no more than personal inconvenience, for it was readily admitted that at all times the shelves of his store were "loaded". Furthermore, no proof was offered showing that the employer's customers were in any way or at any time intimidated, molested or interfered with, nor did the employer attempt to prove any loss of patronage or business profits. Such showing fails to establish the "substantial and irreparable injury to complainant's property" essential to justify the issuance of an injunction (Civ. Prac. Act, §876-a, subd. 1, par. [b]; *Florsheim Shoe Store Co.* v. *Retail Shoe Salesmen's Union*, 288 N. Y. 188; *Busch Jewelry Co.* v. *United Retail Employees' Union*, 281 N. Y. 150; *Remington Rand, Inc.* v. *Crofoot*, 279 N. Y. 635).

It should be mentioned that for a few days during March, 1953, the union picketed the Reilly Storage Ware-

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house Company located at 149th Street and Third Avenue where liquor consigned to the employer was stored. When the pickets were withdrawn, for a short time at least, lookouts were posted, but all such activities were voluntarily discontinued long before commencement of the within suit. Nothing was shown to indicate that the union intended to resume picketing at the warehouse in the future. This affords no evidentiary basis for restraining by injunctive means the picketing being peacefully conducted in front of the employer's retail store (*cf. Dinny & Robbins, Inc.* v. *Davis*, 290 N. Y. 101; *May's Furs & Ready-to-Wear, Inc.* v. *Bauer*, 282 N. Y. 331, *supra*).

Prior to the commencement of the within suit and on or about October 30, 1951, the employer filed a petition with the New York State Labor Relations Board (State Labor Relations Act [Labor Law, art. 20], §705) seeking an election to determine whether the union was an authorized bargaining agent. After a hearing, the petition was dismissed for the reason that (1) the union had not claimed to and did not represent the workers and had never demanded of or submitted a collective contract to the employer (cf. *Matter of Lombardi* v. *Cooks, Countermen, Soda Dispensers & Assistants Union*, 14 S. L. R. B. No. 100; *Matter of Minsang Wet Wash Co.*, 14 S. L. R. B. No. 130), and (2) that the union was merely engaged in an organizational activity (*Matter of Wood* v. *Wine & Liq. Store Employees Union*, 15 S. L. R. B. No. 23, Case No. SEE-20870). Following such dismissal, the employer commenced an action for injunctive relief to restrain the picketing altogether. This too resulted in a dismissal (*Wood* v. *O'Grady*, N. Y. L. J., April 28, 1952, p. 1682, col. 2).

The Special Term, in dismissing the within complaint on the merits, made findings of fact to support its conclusion that the union's picketing in front of plaintiff's store was peaceful and unaccompanied by violence and was for a lawful purpose, namely, "for the purpose of organizing the employees of the plaintiff's store, and to call the public's attention to the fact that the plaintiff's is a non-union store, and to ask the public to patronize union stores". The Spe-

cial Term pointed out that, "Assuming that a labor dispute is not involved and that therefore the complaint is not required to comply with the provisions of section 876-a of the Civil Practice Act, plaintiff nevertheless has failed to establish that he is entitled to an injunction restraining peaceful picketing."

Upon appeal to the Appellate Division, First Judicial Department, that court unanimously reversed, making new findings to support its conclusion of law that the picketing complained of is "for an unlawful objective in that it seeks to coerce the employer into signing a contract with Respondent union by exerting economic pressure against the employer to force him to violate the State Labor Relations Act by compelling the employees to join Respondent union against their will or, in the alternative, to drive plaintiff out of business" which it deemed violative of sections 703-704 of the Labor Law in that it was forcing the employer to contract "with a union that does not represent any of his employees". (*Wood* v. *O'Grady*, 283 App. Div. 83, 85.) Such findings and conclusions are contrary to the overwhelming weight of the evidence. As we have already said, the evidence convincingly establishes that at no time did the union claim to this employer or to any one else for that matter—that it collectively represented his workers and at no time did it demand a collective contract for the very good reason that none of his employees had joined their union and none were members at that time. Notwithstanding that state of the record, the Appellate Division nonetheless cited as authority *Goodwins, Inc.* v. *Hagedorn* (303 N. Y. 300); *Metropolis Country Club* v. *Lewis* (202 Misc. 624, affd. 280 App. Div. 816); *Haber & Fink* v. *"Jones"* (277 App. Div. 176); *Plastic Calendering Corp.* v. *Spilberg* (121 N. Y. S. 2d 297, 304).

An examination of those cases discloses their inapplicability to the present situation. In *Goodwins* (*supra*), for instance, we were not dealing with peaceful picketing for purposes of organization (cf. *May's Furs & Ready-to-Wear, Inc.* v. *Bauer*, 282 N. Y. 331, *supra*; *Exchange Bakery & Restaurant, Inc.* v. *Rifkin*, 245 N. Y. 260, *supra*), but rather

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with picketing to compel employer recognition as collective bargaining agent of its workers, despite the fact that a certification proceeding on that very issue was pending before the National Labor Relations Board to determine whether the picketing union or a rival union should be certified, a quite different situation.

Metropolis (*supra*) involved untruthful representation while in *Haber & Fink* (*supra*) there was violence in an attempt to nullify an election resulting in a vote of "no union". In *Plastic Calendering Corp.* v. *Spilberg* (*supra*), it was conceded by both sides that the purpose of the picketing was to obtain recognition of a local union as the employees' collective bargaining agent without certification by the National Labor Relations Board. However, there is nothing in that group of cases or the statute authorizing the use of an injunction in peaceful picketing for avowedly organizational purposes. It is only when the picketing is unlawful that it may properly be restrained (cf. *Building Service Union* v. *Gazzam*, 339 U. S. 532; *Plumbers Union* v. *Graham*, 345 U. S. 192; *Goodwins, Inc.* v. *Hagedorn*, *supra*). It is axiomatic that we may not, under the guise of interpretation, import into a statute conditions or criteria which the Legislature has been careful to omit. By the same token, we may not review a record in such a way as to bypass the clear meaning and intent of the Legislature. If the Legislature wishes to sound the death knell of peaceful organizational picketing by repealing section 876-a as a declaration of State policy, or by amending it, so as to permit the restraint of peaceful organizational picketing as unlawful because "exerting economic pressure" in addition to that presently defined as "substantial and irreparable injury to complainant's property" it, of course, may do so but we may not.

In the court below much stress was laid on the length of time the within picketing had continued without success, as being in the nature of unlawful economic coercion. The test of illegality, as we see it, is not whether any particular picketing has "gone on long enough" but rather whether

such picketing is being lawfully conducted in the furtherance of union interests in a statutory labor dispute. If picketing is a legally protected right one day, it continues as such into the next. Section 876-a prescribes no time limit.

The judgment of the Appellate Division should be reversed and that of Special Term reinstated, with costs in this court and in the Appellate Division.

DESMOND, J. (concurring). I join in Judge DYE's opinion and agree for reversal and dismissal of the complaint, but I add (or restate) some reasons therefor.

Since the picketing (even though "organizational" only) at plaintiff's place of business was peaceful and since the picketing signs spoke the truth, there could not, constitutionally (*Thornhill* v. *Alabama*, 310 U. S. 88; *A. F. of L.* v. *Swing*, 312 U. S. 321; *Stillwell Theatre, Inc.* v. *Kaplan*, 259 N. Y. 405), be an injunction here unless there was, at the least, proof and valid finding of an "unlawful labor objective" (*Goodwins, Inc.* v. *Hagedorn*, 303 N. Y. 300, 305). The illegal purpose of this picketing, so the Appellate Division found, was to coerce the employer to act in violation of sections 703 and 704 of our State Labor Law by insisting that his employees join the union. That finding was based on another finding that none of appellant's employees had "yielded to union membership despite almost two years of exhortation and enticement and despite the fact that the picket line has been maintained outside of Appellant's store during all this time". Let us assume that the continuance of the picketing after and despite the failure of the clerks to join the union, would be, without more, adequate proof that the real purpose of the union was to compel plaintiff to violate the State Labor Relations Act (Labor Law, art. 20). But this record contains testimony, undisputed although not the subject of any finding below, which shows that the employees were actually coerced by the employer *not* to join the union. Thus, this record establishes that the picketing was in aid of the constitutional and statutory right of these clerks to make their own unimpeded choice as to whether or not to be organized.

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This record, in another respect, lacks adequate support for the injunction. Under section 876-a of the Civil Practice Act, and by the general rules of equity (*Kane* v. *Walsh*, 295 N. Y. 198, 205, 206), an injunction may be granted only on a showing that there will, otherwise, be irreparable injury. I see no proof of any substantial injury of any kind to plaintiff from the picketing of the store (the picketing of the warehouse continued for a few days only and ended long before the trial). There is no showing of any falling off in patronage, or any shortage of merchandise.

Fuld, J. (concurring). In an endeavor to pinpoint my vote for reversal, I add these few words of my own.

Broad as is the concept of a "labor dispute," it is now settled (1) that section 876-a of the Civil Practice Act would not be applicable if the picketing sought to be enjoined were designed to further an "unlawful labor objective" (see, e.g., *Goodwins, Inc.* v. *Hagedorn*, 303 N. Y. 300, 305) and (2) that the right of free speech, as guaranteed by the Fourteenth Amendment, would not protect even peaceful picketing if its objective were unlawful. (See e.g., *Plumbers Union* v. *Graham*, 345 U. S. 192, 201; *Building Service Union* v. *Gazzam*, 339 U. S. 532; *Teamsters Union* v. *Hanke*, 339 U. S. 470.) Accordingly, if in this case the picketing had been directed only against the employer, to induce him to recognize the union, if, in other words, defendant's actual purpose in carrying on that picketing had been, not to organize the employees, but to bring pressure to bear upon the employer to compel his employees to join the union, I would favor an affirmance and the issuance of an injunction.

The record before us, however, fails to establish that the picketing was for that illegal objective. The weight of the evidence strongly supports the conclusion, reached by the trial court, that the picketing was for organizational purposes, to persuade the employees to become members of the union. Such an objective has long been deemed lawful and legitimate in this state (Civ. Prac. Act, §876-a, subd. 10, par. [c], L. 1935, ch. 477; see *Exchange Bakery & Restaur-*

ant, Inc. v. *Rifkin*, 245 N. Y. 260; *May's Furs & Ready-to-Wear, Inc.* v. *Bauer*, 282 N. Y. 331, 337-341), and, if there is to be a change, it is for the legislature to effect it.

Van Voorhis, J. (dissenting). The facts have been stated in the unanimous opinion of the Appellate Division, First Department, which, in our view, correctly concluded that the picketing of plaintiff's premises has been for an unlawful objective and should be enjoined. Petitioner is the licensee of a package liquor store at 135 East 53rd Street, New York City. He employed three sales clerks, who constituted his entire labor force when this controversy arose, except for two part-time employees who worked on his books and a man who assisted him with trucking. In October, 1951, defendant union sought to organize plaintiff's three sales clerks. When these employees declined to join the union, picketing began and continued for two years until an injunction was issued by the Appellate Division in December, 1953. There is no labor dispute here in the understood sense of the term. Section 876-a of the Civil Practice Act consequently does not apply. It was correctly said by the Appellate Division in this case (283 App. Div. 83, 85): "Plaintiff has never been presented with any grievances as to wages, hours or working conditions by his employees. The union has never made any claim of representing any of plaintiff's employees. From this record, it is abundantly clear that plaintiff's employees are unwilling to be represented by defendant union. Up to the time of the trial, the 'organizational' activities of the union had continued for a period of well over a year and a half, but had been wholly unsuccessful. Such activities are still continuing with no apparent success." Although unsuccessful in getting any of these few employees to join, this union has attempted to overpower this small employer by using its much greater resources to drive away his patronage, to prevent deliveries to his store by any of the regular suppliers and to cut him off from the use of any of the liquor warehouses, making every possible endeavor to drive him out of business. "As a result of these activ-

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ities," the Appellate Division has said, "plaintiff is faced with the alternative of either going out of business or contracting with a union that does not represent any of his employees, the latter course being in violation of section 17 of Article I of the New York State Constitution and sections 703 and 704 of the New York State Labor Law." (283 App. Div. 85.) Thus it appears that there is nothing which plaintiff can do to save his business by satisfying the demands of this union, except to violate the Labor Law by compelling his employees to sign up with a union which they do not want to join. There are no findings either by the trial court or by the Appellate Division that this employer has been guilty of the unfair labor practices ascribed to him, which plaintiff denies, and if he had been guilty of them, complaints would certainly have been made by the union to the State Labor Relations Board. Yet no such charges have been lodged against him by the union during the three years which have elapsed since these incidents are said to have occurred. The injunction granted by the unanimous Appellate Division is in accord with the great preponderance of judicial authority, both in this State and elsewhere, as appears from the cases hereafter cited.

Appellant's contention cannot be sustained that the Supreme Court may not exercise its equitable powers where picketing is conducted for an illegal purpose (*Goodwins, Inc.* v. *Hagedorn*, 303 N. Y. 300; *American Guild of Musical Artists* v. *Petrillo*, 286 N. Y. 226, 231; *Building Service Union* v. *Gazzam*, 339 U. S. 532). Appellant next contends that, in any event, this was organizational picketing conducted for a lawful purpose. There are numerous decisions under the law as it existed prior to the National and State Labor Relations Acts, sustaining the right to engage in peaceful organizational picketing, e.g., *Nann* v. *Raimist* (255 N. Y. 307, 319); *Exchange Bakery & Restaurant, Inc.* v. *Rifkin* (245 N. Y. 260); *May's Furs & Ready-to-Wear, Inc.* v. *Bauer* (282 N. Y. 331). But an important object of the Labor Relations Acts was to mitigate the sharpness of labor warfare. Before union organization and represen-

tation became protected by these statutes, it was legitimate practice for a union to bring the employer to his knees by exerting economic pressure upon him to force his employees to join a union and to contract with the union in their behalf. The right of a union to do this was upheld as helping to counteract weapons in the employer's arsenal, such as the lockout and the yellow dog contract (*Exchange Bakery & Restaurant, Inc.* v. *Rifkin, supra,* p. 269). The *Exchange Bakery* case has been superseded by the Labor Relations Acts in important respects. Thus the saying in that opinion (p. 264) is no longer true that organizational picketing tends to balance the employer's power to "hire and discharge men when and where he chooses and for any reason. * * * If believed to be for their interests employers may agree to employ non-union men only." That is as out of date as the next statement in *Exchange Bakery* that if employees "subsequently joined the union they might have been discharged" (p. 269). Although appellant union would be the first to agree that this part of the *Exchange Bakery* case is no longer law, the same case is pressed on our attention as present day authority in support of the unrestricted right to engage in organizational picketing and boycott. The circumstance must be faced that in both respects the rulings in *Exchange Bakery & Restaurant, Inc.* v. *Rifkin* and similar cases have been changed by the Labor Relations Acts.

There is no dispute that respondent conducts an intrastate business, and that the New York State Constitution and the Labor Relations Act apply. These enactments established that "Employees shall have the right to organize and to bargain collectively through representatives of their own choosing." (N. Y. Const., art. I, §17.) The employer can no longer coerce his employees to join a company union, or to select one independent union in preference to another, or compel them to choose between joining a union and being nonunion. Neither the State Constitution nor Labor Relations Act distinguishes in this respect between organizational activity and collective bargaining. Section 703 of the State Labor Relations Act (Labor Law, art. 20) requires

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that: "Employees shall have the right of *self-organization, to form, join,* or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, *free from interference, restraint, or coercion of employers,* but nothing contained in this article shall be interpreted to prohibit employees from exercising the right to confer with their employer at any time, *provided that during such conference there is no attempt by the employer, directly or indirectly, to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by this section.*" (Italics supplied.)

Subdivision 3 of section 704 makes it an unfair labor practice for an employer:

> "To dominate or interfere with *the formation,* existence, or administration of any employee organization or association, agency or plan which exists in whole or in part for the purpose of dealing with employers concerning terms or conditions of employment, labor disputes or grievances * * *
>
> "(b) *by urging the employees to join any such employee organization or association, agency or plan for the purpose of encouraging membership in the same.*" (Italics supplied.)

It has recently been held that this legislation renders picketing unlawful for the purpose of forcing an employer to recognize a union as collective bargaining agent (*Goodwins, Inc.* v. *Hagedorn,* 303 N. Y. 300, *supra*). The same principle applies where the choice to be made by the employees is between union and nonunion status as where it is between rival unions (*Buildings Service Union* v. *Gazzam,* 339 U. S. 532, *supra*). A distinction is asserted by appellants between the *Goodwins* case and a situation like the present where the union is not in position to demand a labor contract for the reason that it represents none of the employees. The State Labor Relations Board, by a

divided vote, denied the employer's petition to conduct an election in this case, upon the ground that the case does not involve representational but organizational activity.

A simple analysis of the question shows that the distinction is without substance in this action. In the first place, on the basis of sufficient evidence, the Appellate Division has found that the objective of this picketing is both to force the employer to compel these employees to join the union and to coerce the employer to sign a contract; and, second, the Constitution and statute leave no room for a distinction between interference by the employer in organizational and representational activity by the union. As the text shows in the italicized portions that have been quoted, an employer is forbidden to coerce his employees to join a particular union just as definitely as he is forbidden to yield to coercion in recognizing a union as the exclusive bargaining agent for his employees unless they have selected it. The language of the statute forbids such a conclusion. "Picketing for organizational purposes is only fictionally different from picketing for immediate recognition. The same kind of pressure on both employer and employees exists in either case; furthermore, the union is trying to force the employer to coerce his employees in either case; and finally, the union's basic desire—the desire for exclusive bargaining status—is the same in either case. The only difference relates not to the conduct of the union, or its effects, but to the union's explanation of its conduct." (Petro, Recognition of Picketing Under the NLRA, C. C. H., Labor L. J., Nov., 1951, pp. 803, 805.)

The object is equally unlawful whether the employer seeks to compel union affiliation of his employees or their representation by the union after they have joined. The only object in organizing a union is to enable the union to act as collective bargaining agent. Indeed, appellant union appears at the trial to have abandoned this distinction when one of its business agents testified:

> "Q. Do you expect Mr. Wood to suggest to his men that they join the union? A. No.

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"Q. You know that would be against the law, is that right? A. That I would know.

"Q. And you also know it would be against the law for Mr. Wood to sign a contract with your union when his employees have not selected your union as their bargaining agent; you know that? A. That is true; that is right.

"Q. So despite the fact that you know those two things, you are still picketing Mr. Wood's store? A. That is true."

Evidently realizing that no legal basis exists for boycotting the employer under these circumstances, appellants take the position that the union in this instance is picketing not the employer but his employees. If that were true, the signs carried by the pickets would not have read "Please do not patronize this non-union store." The store is not owned by the employees; the attempt to destroy the patronage is aimed at the employer who can only continue in business if he has the patronage of his customers. As the United States Supreme Court has recognized, industrial picketing "'is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.'" (*Hughes* v. *Superior Court of California*, 339 U. S. 460, 464-465, per Frankfurter, J., quoting from Douglas, J., in *Bakery & Pastry Drivers & Helpers Local* v. *Wohl*, 315 U. S. 769, 776.)

As the Trial Justice herein took judicial notice, the mere presence of a picket line stops many people from crossing it, regardless of the merits of the controversy or the legality of the objective. In this instance, it prevented and was intended to prevent delivery of merchandise at plaintiff's place of business by all of his suppliers, as well as curtailing the number of customers. This was action directed at the employer himself. Moreover, it could not possibly be thought that the picketing of the warehouses through which plaintiff was supplied was directed at plain-

tiff's employees. They did not work at these warehouses; it was an attempt at secondary boycott for the purpose of driving plaintiff out of business. The motivation remained the same after the picket lines were withdrawn from the warehouses, which occurred when the union was evidently advised that the secondary-boycott procedure was illegal. After the pickets were withdrawn from the warehouses, lookouts were maintained there and continued until the trial. These lookouts warned away all drivers carrying plaintiff's merchandise, which effectively prevented plaintiff's use of the warehouses. Discontinuance of those picket lines averted interference with other business of the warehouses than with plaintiff, but the lookout activity was clearly aimed at injuring plaintiff rather than at persuading his employees inasmuch as it was conducted away from plaintiff's premises, and had no relation to plaintiff's employees, except as it might instill fear into them that plaintiff would be driven out of business and that the union might prevent their employment elsewhere. As was said in *Haber & Fink, Inc.* v. *"Jones"* (277 App. Div. 176, 182-183), the union activity "directly affects, and is intended to affect, plaintiff's business, which is not to be justified in this instance by a pretext that it is done to convince plaintiff's employees. If the employees are to be solicited, it must be done in some manner which does not result in the coercion of plaintiff." Invoking the sanctions involved in picketing is more than free speech; it is concerted action instituting a boycott. It is more than merely publicizing the fact that these employees have not joined a union. Picketing must have an object. The avowed object in this instance was to disrupt plaintiff's business and to prevent customers from patronizing plaintiff's store. If the signs said, instead, that customers and suppliers were not asked to boycott plaintiff's store but were invited to urge plaintiff's employees to join the union, then it might be said that the picketing was directed at the employees. The fact that signs reading that way would only be ridiculed by the union illustrates that the true object is to injure the business of the employer. "The right to carry on business—be it called

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liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted." (*Dorchy* v. *Kansas*, 272 U. S. 306, 311, per Brandeis, J.) That statement is equally true respecting this situation. The following statement in the opinion of this court in *Opera on Tour, Inc.* v. *Weber* (285 N. Y. 348, 355) is relevant here: "If on the other hand the labor objective here sought is illegal and not a lawful labor objective, since it has no reasonable connection with wages, hours, health, safety, the right of collective bargaining, or any other condition of employment or for the protection of labor from abuses, then there is no immunity for injury inflicted by a labor union. For such activities labor is not free from legal responsibility. '* * * *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law * * * requires a justification if the defendant is to escape. * * *' (Mr. Justice Holmes in *Aikens* v. *Wisconsin*, 195 U. S. 194, 204.)" (See, also, *Advance Music Corp.* v. *American Tobacco Co.*, 296 N. Y. 79).

If this were a labor dispute, involving wages, hours or working conditions, the economic pressure brought to bear upon the employer would be lawful, as a proper step in collective bargaining. It would be within the employer's power to increase wages, shorten hours or improve working conditions, but under the circumstances presented here, what can the employer legally do? Recourse to the Labor Relations Board has been denied to him. The only thing which he could do in order to alleviate the economic pressure and save his business would be to compel his employees to join this union. That, as the union's own business agent admits, would constitute an unfair labor practice and involve him in a violation of the State Labor Relations Act. The cases clearly hold to that effect. (*Goodwins, Inc.* v. *Hagedorn*, 303 N. Y. 300, *supra; Haber & Fink, Inc.* v. *"Jones"*, 277 App. Div. 176, *supra; Chic Maid Hat Mfg. Co.* v. *Korba*, 281 App. Div. 1004; *Metropolis Country Club* v. *Lewis*, 202

Misc. 624, aff'd. 280 App. Div. 816; *Building Service Union* v. *Gazzam*, 339 U. S. 532, *supra; Bean* v. *Local Union No. 698, Retail Clerks Union*, 94 Ohio App. 361; *Way Baking Co.* v. *Teamsters & Truck Drivers Local 164, A. F. of L.*, 335 Mich. 478, certiorari denied 345 U. S. 957; *Klibanoff* v. *Tri-Cities Retail Clerks' Union*, 258 Ala. 479; *Voeltz* v. *Bakery & Confectionery Workers*, 233 P. 2d 624 [Calif. Dist. Ct. App., 1951], aff'd. 40 Cal. 2d 382; *Bitzer Motor Co.* v. *Teamsters, Local 604*, 349 Ill. App. 283; *Katz Drug Co.* v. *Kavner*, 249 S. W. 2d 166 [Mo. Sup. Ct., 1952]; *Wisconsin Employment Relations Bd.* v. *Retail Clerks*, 264 Wis. 189; *Hotel & Restaurant Employees Union* v. *Lambert*, 258 S. W. 2d 694 [Ky. Ct. App., 1953]; *Hayes Freight Lines* v. *Teamsters Union*, 33 LRRM 2671 [Tenn. Ct. App., 1954]; *S. & H. Grossinger, Inc.* v. *Burke*, 124 N. Y. S. 2d 40; *Selton Service* v. *Dioguardi*, 116 N. Y. S. 2d 36; *House of Styles, Inc.* v. *Doe*, 130 N. Y. S. 2d 45; *Tarrytown Road Restaurant Co.* v. *Hotel, Restaurant & Beverage Dispensers Union*, 115 N. Y. S. 2d 626; *Plastic Calendering Corp.* v. *Spilberg*, 121 N. Y. S. 2d 297; *Saperstein* v. *Rich*, 202 Misc. 923; *Gallespie Constr. Co.* v. *Hod Carriers*, 32 LRRM 2383 [Fla. Cir. Ct., 1953]; *Woodard* v. *Collier*, 210 Ga. 239; *Huff Truck Lines, Inc.* v. *Truck Drivers', Local 270*, 30 LRRM 2571 [La. Civ. Dist. Ct., Orleans Parish, 1952]; *Wischhusen* v. *Griffin*, 32 LRRM 2426 [Md. Cir. Ct., 1953]; *Hall Steel Co.* v. *Teamsters*, 31 LRRM 2645 [Mich. Cir. Ct., 1952]; *Cordey China Co.* v. *United Mine Workers, Dist. 50*, 25 N. J. Super. 514; *Couris* v. *Waiters Union*, 34 LRRM 2246 [Pa. Ct. Common Pleas, 1954]; *Lotmar Corp.* v. *Norton*, 117 N. Y. S. 2d 607; *Bon-Flo Taxi Corp.* v. *Norton*, 118 N. Y. S. 2d 249; *Cornell Beverages, Inc.* v. *Engar*, N. Y. L. J., Dec. 9, 1953, p. 1389, col. 5; *Kleet* v. *O'Rourke*, 124 N. Y. S. 2d 603; *Anchorage, Inc.* v. *Waiters & Waitresses Union Local 301*, 25 Labor Cases, 85773, 34 LRRM 2012 [Pa. Ct. Common Pleas, 1954]; *Matter of Kappel* v. *Local 71, Qualified & Misc. Workers*, 13 S. L. R. B. No. 116; *Irving Subway Grating Co.* v. *Silverman*, N. Y. L. J., Oct. 1, 1953, p. 614, col. 7; *Fireproof Products Co.* v. *Silverman*, 32 LRRM 2729 [Sup. Ct., N. Y. County, Sept. 28, 1953, Eder, J.]; *Amazon* v. *Local 178*,

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Hotel & Restaurant Beverage Dispensers Ind. Union, N. Y. L. J., March 17, 1953, p. 889, col. 3.) In all of those cases, as well as in others, peaceful picketing was considered to be for an unlawful labor objective, and therefore subject to injunction, if it was conducted for the purpose of compelling the employer to coerce employees in violation of the freedom of choice in joining a union or in union representation guaranteed to them by the Federal or State Labor Relations Acts.

While the law permitted the employer to exert such pressure, organizational picketing was lawful. It is not necessary to decide in this case whether there may be some circumstances under which organizational picketing is still lawful, but in no event can the law reasonably be construed as allowing an employer's business to be injured or destroyed when there is nothing which he can do to alleviate the economic pressure except by violating the law.

Another point is made which is said to distinguish this case from *Goodwins, Inc.* v. *Hagedorn* (303 N. Y. 300, *supra*) based on testimony of one of defendants' business agents, Edgar M. Wortman, that plaintiff told him in the presence of his employees that they were not going to sign up for the reason that if they did so they would no longer work in his store. Plaintiff denied that he said this, and there is no finding of fact that he did say it. If he did so, it would have been an unfair labor practice concerning which the union would at once have lodged a complaint with the Labor Relations Board. Three years have elapsed, but no such complaint has been made. No finding that such an incident occurred was even made by the trial court, when the complaint was dismissed. Neither the trial court nor the Appellate Division found that plaintiff made any threats of this nature to his employees. The trial court did find that certain of plaintiff's employees revealed a friendly attitude toward becoming members of this union but expressed a fear that their jobs would be jeopardized. That is not a finding that plaintiff made such threats. It may have been simply a polite way of telling the business agent that they did not choose to join his

union. In any event, this finding was reversed by the Appellate Division and no longer remains in the record. There is not and never has been any finding that plaintiff, in fact, did threaten to discharge any of his employees if they joined this union, even by the trial court which decided in favor of the union. It is incorrect to state that the employer does not deny having done this. He testified: "Q. Mr. Wood, did you ever consult with your employees as to whether or not they should be members of Local 122? A. No, I never did." This testimony by plaintiff is a positive denial that he ever told his employees that they were not to become members of defendant union. Without making a new finding on conflicting evidence, which we lack jurisdiction to do, the decision of this court cannot be based on that ground. Even if the employer had been guilty of an unfair labor practice by threatening discharge if these employees joined the union, the State Labor Relations Board would have had exclusive jurisdiction over such an unfair labor practice (Labor Law, §§704-706). If such a charge had been made to the labor board and sustained, the board was empowered to impose effective sanctions to redress the wrong. The Labor Relations Board could take appropriate steps to prevent the employer from carrying out any threat to discharge his employees for such a cause, and remove any fear of that nature from their minds. Upon the other hand, forcing an employer to coerce his employees into joining a union is not a legal sanction to redress an unfair labor practice.

The injunction could not be sustained and was not granted by the Appellate Division merely for the reason that the picketing was conducted by strangers. It may well be that the union has an interest in having union conditions prevail generally throughout this branch of business (cf. *May's Furs & Ready-to-Wear, Inc.* v. *Bauer*, 282 N. Y. 331, *supra*; *Exchange Bakery & Restaurant, Inc.* v. *Rifkin*, 245 N. Y. 260, 263, *supra*). Nevertheless, the union can accomplish that result only by methods permitted by law, and not by pressurizing an employer to engage in an unfair labor practice forbidden by the Labor Relations Acts.

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The judgment appealed from should be affirmed, with costs.

DESMOND, J., concurs with DYE, J., in a separate opinion; FROESSEL, J., concurs with DYE, J.; FULD, J., concurs for reversal in a separate opinion; VAN VOORHIS, J., dissents in an opinion in which LEWIS, Ch. J., and CONWAY, J., concur.

Judgment reversed, etc.

Judgment.

At a Special Term Supreme Court, Part III, County Court House, New York County on June 22, 1953.

Present:

Hon. HENRY CLAY GREENBERG, Justice.

The above entitled action having been duly tried before Mr. Justice Henry Clay Greenberg at a Special Term, Part III, in the Supreme Court of the State of New York, on the 2nd and 3rd days of June, 1953, and proof on the part of the plaintiff and the defendant having been duly submitted and heard, and the plaintiff having appeared by Bandler, Haas & Kass, Esqs., his attorneys, and the defendant having appeared by Jacob Friedberg, Esq., their attorney, and the Court having made Findings of Fact and Conclusions of Law dated the 22nd day of June, 1953,

Now, on said Findings of Fact and Conclusions of Law, and on motion of Jacob Friedberg, attorney for the defendant, it is

ORDERED, ADJUDGED AND DECREED, that the defendant, its agents, servants and/or employees, is entitled to picket the premises of the plaintiff for the purpose of organizing the employees of the plaintiff's store, and to call the public's attention to the fact that plaintiff's is a non-union store, and to ask the public to patronize union stores, and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant is entitled to continue by proper methods to try to persuade plaintiff's employees to join the Union, and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant, in furtherance of the Union's legitimate interest conduct peaceful and lawful activity towards the objective of unionizing the plaintiff's employees, and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant is entitled to judgment dismissing plaintiff's complaint, and judgment is hereby directed accordingly.

Enter

H. C. G.
Justice of the Supreme Court
of the State of New York.

ARCHIBALD M. WATSON, Clerk.

Filed July 13, 1953.
New York County Clerks Office.

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Remittitur.

COURT OF APPEALS.

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals held at the Court of Appeals Hall in the City of Albany, on the 22nd day of October, in the Year of our Lord One Thousand Nine Hundred and Fifty-Four, before the Judges of said court.

Witness,

The HONORABLE EDMUND H. LEWIS,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

Remittitur October 22, 1954.

No. 91

SYDNEY J. WOOD, doing business under the firm name and style of 53rd STREET SUBWAY LIQUOR STORE,
Respondent,

vs.

JOHN M. O'GRADY, individually and as President, and ano. &c., individually and as Treasurer of the WINE AND LIQUOR STORE EMPLOYEES UNION LOCAL 122, A. F. of L., and ors.
Appellants.

BE IT REMEMBERED that on the 22nd day of January in the Year of our Lord One Thousand Nine Hundred and

Fifty-Four, John M. O'Grady, individually and as President, and ano. &c., individually and as Treasurer of the Wine and Liquor Store Employees Union Local 122, A. F. of L., and ors. &c., the appellants in this cause came here unto the Court of Appeals by Jacob Friedberg, their attorney, and filed in the said court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Sydney J. Wood, doing business under the firm name and style of 53rd Street Subway Liquor Store, the respondent in said cause afterwards appeared in said Court of Appeals by Bandler, Haas & Kass, his attorneys. Which said Notice of Appeal and the return thereto filed as aforesaid are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. Jacob Friedberg, of Counsel for the Appellants, and by Mr. Julius Kass, of Counsel for the Respondent, and brief filed by *amicus curiae* and after due deliberation had thereon did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and that of Special Term reinstated with costs in this Court and in the Appellate Division.

And it is also further ordered that the records aforesaid and the proceedings in this Court be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be reversed and that of Special Term reinstated with costs &c. as aforesaid.

And hereupon as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid by it given in the premises are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the justices thereof according to the form of the statute in such case made and provided to be enforced according to law and which record

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now remains in the said Supreme Court before the justices thereof &c.

/s/ Raymond J. Cannon,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals
Clerk's Office
Albany, October 22, 1954

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals with the papers originally filed therein attached thereto.

/s/ Raymond J. Cannon,
Clerk.

Order.

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, 60 Centre Street, Borough of Manhattan, City of New York, on the 29th day of October, 1954.

Present:

Hon. FELIX C. BENVENGA,
Justice.

SYDNEY J. WOOD, doing business under the firm name and style of 53rd STREET SUBWAY LIQUOR STORE,
Plaintiff,

against

JOHN M. O'GRADY, individually and as President, and "JAMES DOE", name fictitious, true name unknown to plaintiff, individually and as Treasurer of the Wine and Liquor Store Employees Union, Local 122, A. F. of L., WINE AND LIQUOR STORE EMPLOYEES UNION LOCAL 122, A. F. of L., and "JOHN DOE", "RICHARD ROE", "MICHAEL DOE", et al.,
Defendants.

The above named defendants having appealed to the Court of Appeals from the judgment of the Appellate Division of this court, First Department, entered on the 6th day of January, 1954, in the office of the Clerk of New York County, and the Court of Appeals having heard said appeal

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and ordered and adjudged that the judgment so appealed from be reversed, and judgment entered for the defendants, with costs, in the Court of Appeals and in the Appellate Division, and that the judgment herein of Special Term be reinstated, with costs, and the remittitur having been filed in the office of the Clerk of New York County,

Now, on motion of Jacob Freidberg, Esq., attorney for defendants, it is

ORDERED that the said judgment of the Court of Appeals be, and the same hereby is, made the judgment of this court; and that the judgment entered herein originally, pursuant to the direction of Special Term on the 13th day of July, 1953, be, and the same is hereby reinstated, and that a judgment of this court be entered herein, affirming said original judgment entered herein, together with costs in the Court of Appeals, in the Appellate Division and in Special Term, to be taxed against the plaintiff.

Enter,

F. C. B.
J. S. C.

Filed
Oct. 29, 1954
N. Y. Co. Clerks office

Judgment.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

SYDNEY J. WOOD, doing business under the firm name and style of 53rd STREET SUBWAY LIQUOR STORE,

Plaintiff,

against

JOHN M. O'GRADY, individually and as President and "JAMES DOE", name fictitious, true name unknown to plaintiff, individually and as Treasurer of the Wine and Liquor Store Employees Union, Local 122, A. F. of L., WINE AND LIQUOR STORE EMPLOYEES UNION LOCAL 122, A. F. of L., and "JOHN DOE", "RICHARD ROE", "MICHAEL DOE", *et al.*,

Defendants.

The above-named defendants having appealed to the Court of Appeals from a judgment of the Appellate Division of this court, First Judicial Department, on the 6th day of January, 1954, reversing the judgment entered therein on the 13th day of July, 1953 in the office of the Clerk of New York County, and the Court of Appeals having heard said appeal, and ordered and adjudged that the judgment so appealed from be reversed and judgment rendered for defendants, with costs, and the remittitur from the Court of Appeals having been filed in the office of the clerk of New York County, and an order having been entered thereon making the judgment of the Court of

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Appeals the judgment of this court, and directing the entry of a judgment of reversal herein with costs of said appeal to be taxed against plaintiff in the sum of One thousand twenty-three and 42/100 ($1,023.42) Dollars,

Now, on motion of Jacob Friedberg, Esq., attorney for the defendants, it is

ADJUDGED that the judgment in this action entered on the 6th day of January, 1954, be and the same is hereby reversed, and that of Special Term reinstated and that John M. O'Grady, individually and as President, and "James Doe", name fictitious, true name unknown to plaintiff, individually and as Treasurer of the Wine and Liquor Store Employees Union Local 122, A. F. of L., Wine and Liquor Store Employees Union Local 122, A. F. of L., of 853 Broadway, Borough of Manhattan, City, County and State of New York, recover of Sydney J. Wood, doing business under the firm name and style of 53rd Street Subway Liquor Store, of 135 East 53rd Street, Borough of Manhattan, City, County and State of New York, the sum of One thousand twenty-three and 42/100 ($1,023.42) Dollars, the amount of costs herein as taxed, and that the defendants have execution therefor.

Dated, the 1st day of November, 1954.

ARCHIBALD R. WATSON,
Clerk.

Office - Supreme Court, U. S.
FILED
MAY 6 1955
HAROLD B. WILLEY, Clerk

No. 717.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

SYDNEY J. WOOD, doing business under the firm name and style of 53RD STREET SUBWAY LIQUOR STORE,

Petitioner,

against

JOHN M. O'GRADY, individually and as President, and "JAMES DOE", name fictitious, true name unknown to plaintiff, individually and as Treasurer of the Wine and Liquor Store Employees Union, Local 122, A. F. of L., WINE AND LIQUOR STORE EMPLOYEES UNION, LOCAL 122, A. F. of L., and "JOHN DOE", "RICHARD ROE", "MICHAEL DOE", *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENTS IN OPPOSITION.

JACOB FRIEDBERG,
130 West 42nd Street,
New York, N. Y.,
Attorney for Respondents.

Of Counsel:
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WILBUR DANIELS.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	2
Argument	7
1. Petitioner cannot invoke this Court's jurisdiction under 28 U. S. C., Section 1257(3) because he failed to raise or preserve any federal question in the state courts, nor did the state courts decide any federal question	7
2. Even had federal questions been preserved in the state courts, Petitioner presents no substantial federal question warranting review by this Court	8
Conclusion	10
Appendix (§876-a of New York Civil Practice Act)	11

Citations.

Cases.

	PAGE
American Steel Foundries v. *Tri-City Central Trades Council*, 257 U. S. 184	9
Building Service Union v. *Gazzam*, 339 U. S. 532	9
Carpenters Union v. *Ritter's Cafe*, 315 U. S. 722	9
C. I. O. v. *McAdory*, 325 U. S. 472	8
Giboney v. *Empire Storage Company*, 336 U. S. 490	9
Herndon v. *Georgia*, 295 U. S. 441	7
Hughes v. *Superior Court*, 339 U. S. 460	9
Lauf v. *E. G. Shinner & Co.*, 303 U. S. 323	8
Live Oak Assn. v. *R.R. Comm.*, 269 U. S. 354	8
Plumbers Union v. *Graham*, 345 U. S. 192	9
Radio Station WOW v. *Johnson*, 326 U. S. 120	7
Sayward v. *Denny*, 158 U. S. 180	8
Senn v. *Tile Layers Union*, 301 U. S. 468	8
Teamsters Union v. *Hanke*, 339 U. S. 470	9
Thornhill v. *Alabama*, 310 U. S. 88	9
Waters-Pierce Oil Co. v. *Texas*, 212 U. S. 112	7
Zadig v. *Baldwin*, 166 U. S. 485	8

Statutes and Rules.

New York Civil Practice Act, §876-a	2, 4, 5, 6
New York State Labor Relations Act	4, 5
Rules of the Court of Appeals of the State of New York, Rule VII	7

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Opinions Below.

The opinion of the New York Supreme Court, Special Term (Pet. 25-26) is not officially reported but is reported at 23 Labor Cases ¶67,696. The opinion of the Appellate Division (Pet. 26-29) is reported at 283 App. Div. 83. The opinions of the Court of Appeals of the State of New York (Pet. 29-49) are reported at 307 N. Y. 532.

Jurisdiction.

Though Petitioner invokes the jurisdiction of this Court under 28 U. S. C., Section 1257 (3), in our view there is no jurisdiction because the asserted federal questions were never properly raised in the state court proceedings below.

Question Presented.

We believe the question asserted by Petitioner is not properly before the Court both because it was not raised in the courts below and because in any event the underlying factual assumptions are not borne out either by the record or the findings below.

The question which Petitioner seeks to raise is whether a state, consistently with the due process and equal protection clauses of the Constitution, may refuse to enjoin peaceful organizational picketing of several years' duration which, it is asserted, may ultimately result in putting the employer out of business.

Statute Involved.

The pertinent provisions of §876-a of the Civil Practice Act of the State of New York are set out in the Appendix, *infra,* pp. 11-15.

Statement.

Petitioner's statement throughout departs in major respects from the facts as found by the Court of Appeals, omits facts deemed of decisive importance by that court, and recites as "facts" allegations either rejected by that court or not contained in the record at all.

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The facts, as found by the Court of Appeals and as shown by the evidence, may be summarized as follows:[1]

The petitioning Employer employs among others three sales clerks in his liquor store in the City of New York. The respondent Union is the collective bargaining representative for liquor store clerks in New York (31; 90, 106-107, 303). In October 1951, the Union began organizational efforts among the Employer's sales clerks (31; 274-275). At no time did the Union claim to represent the clerks or demand that the Employer sign a contract (31, 33, 34; 46-47, 97, 112-113, 124-127, 251, 277, 282, 292).

The Employer's response to the Union's organizing efforts was to threaten to fire his workers if they joined the Union (31, 32, 36; 78, 243-244, 280, 281, 294, 299).

The Union thereupon placed one or two pickets in front of the store on October 20, 1951, carrying a truthful picket sign as follows (31; 96, 224-226):

> "The employees of this store are non-union. Please do not patronize this non-union store. We are members of the American Federation of Labor, Local 122 of A. F. L."

After the picketing commenced, the Employer continued to coerce his employees to keep them from joining the Union; among other things, he threatened to close his store if they became Union members (32; 243-244).

The Employer also filed a representation petition with the New York State Labor Relations Board, which the Board dismissed because it found that the Union was simply engaged in organizational activity among the employees, had never claimed to represent them, and therefore no ques-

---

[1] In the following statement, the references preceding the semicolons are to the opinion of the Court of Appeals as reprinted at pp. 29-38 of the Petition, and the succeeding references are to the supporting evidence.

tion of representation existed (33; 43-51). A subsequent injunction action brought by the Employer to restrain all picketing was likewise dismissed by the Supreme Court at Special Term (33; 30 LRRM 2090).

The Union continued its picketing in front of the Employer's store. Admittedly the picketing has at all times been entirely peaceful (31; 79-80). In March 1953 the Union also briefly picketed in front of a warehouse where the Employer had stored liquor consigned to him, but within a few days and long before the instant action was commenced this picketing was voluntarily discontinued and never resumed (32-33; 207-211, 256-257, 261). This short-lived picketing in front of the warehouse, the Court of Appeals later held, afforded "no evidentiary basis for restraining by injunctive means the picketing being peacefully conducted in front of the employer's retail store" (33).

The instant action was commenced in May 1953, about a year and a half after the store picketing started, to restrain all picketing in front of the store. The complaint was based on the theory that the Union was unlawfully seeking to compel the Employer to violate the State Labor Relations Act, and asserted that the controversy did not constitute a "labor dispute" within the meaning of §876-a of the Civil Practice Act, the "little Norris-La Guardia Act" (29; 26). No claim was made, however, that a denial of the injunction would violate the Employer's rights under the Federal Constitution.

In this action, the Employer made many allegations about the purpose and effect of the picketing which were ultimately rejected by the Court of Appeals but which are nevertheless repeated as "facts" by the Employer in his Petition to this Court.

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Contrary to Petitioner's statement to this Court (Pet. 5), the picketing did not cut off all deliveries of supplies; rather, as the Court of Appeals pointed out, the Employer obtained all the supplies he needed so that at all times his shelves were "loaded" (32, 37; 131, 140).

Contrary to Petitioner's repeated statements to this Court (Pet. 3, 5, 8, 10, 12, 13, 16, 17), there is absolutely no showing that there was any loss in patronage or business profits whatsoever or that the business was reduced to "a shadow of its former operation" (Pet. 13); rather, as the Court of Appeals pointed out, the Employer did not even attempt to make such a showing (32, 37; 323).

Contrary to Petitioner's statement to this Court (Pet. 4, 12, 14), the employees have not shown hostility to the Union; rather, as the Court of Appeals pointed out, certain employees indicated a favorable attitude but refrained from joining the Union for fear that the Employer would make good his threat to dismiss any worker who did so (32; 78, 244-248, 294, 299).

Contrary to Petitioner's repeated statements to this Court that the purpose of the picketing was to force the Employer either to violate the New York State Labor Relations Act or to go out of business (Pet. 3, 6, 8, 10, 16-17), the Court of Appeals found that the very same allegations were "contrary to the overwhelming weight of evidence" (34) and that the peaceful picketing was for "avowedly organizational purposes" and was "being conducted in the furtherance of union interests in a statutory labor dispute" (35, 36; 254, 255).

The trial court dismissed the Employer's complaint, holding that the picketing was for organizational purposes and was lawful both under New York common law and under §876-a of the Civil Practice Act (25-26). The Appellate Division reversed (26-29), but was in turn reversed by the

Court of Appeals which reinstated the judgment of the trial court and dismissed the complaint (29-38, 51-53). The Court of Appeals held that the public policy of the State, as expressed in §876-a of the Civil Practice Act, *infra*, pp. 11-15, forbade the restraint of peaceful organizational picketing and that the legislature, in permitting such picketing, had not prescribed a time limit on such lawful picketing so long as it was being lawfully conducted in the furtherance of Union interests in a statutory labor dispute (35-36, 37-38).

An application by the Employer for reargument[2] was denied by the Court of Appeals on January 13, 1955 (308 N. Y. .....).

Throughout the litigation up to this point, Petitioner had at no stage raised any federal question nor had the Court of Appeals decided any. Apparently realizing that this was a fatal bar to a writ of certiorari from this Court, Petitioner on February 11, 1955, addressed a further application to the Court of Appeals "for amendment of remittitur to show federal questions, or, in the alternative, for reargument to permit more explicit presentation of federal questions." Petitioner stated his purpose was to "make it appear to the Supreme Court of the United States upon application for a writ of certiorari whether or not a federal question was necessarily decided . . ." (Cover and Page 2 of Motion). This application was likewise denied by the Court of Appeals without opinion on March 10, 1955 (308 N. Y. .....).

---

[2] In obvious disregard of the proprieties, this application contained affidavits executed by employees subsequent to the Court of Appeals' decision, purporting to state their unwillingness to join the Union. In its Petition to this Court, Petitioner relies on these affidavits although they are clearly not part of the record (12, 14).

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Argument.

1. Petitioner cannot invoke this Court's jurisdiction under 28 U. S. C., Section 1257(3) because he failed to raise or preserve any federal question in the state courts, nor did the state courts decide any federal question.

Petitioner in no form raised a federal question until after the Court of Appeals had handed down its judgment and had denied without opinion a first motion for reargument. Not until more than three and a half months after the Court of Appeals had decided the case did Petitioner contend for the first time in a second motion to amend remittitur or in the alternative for reargument that federal questions were "implicit" throughout the proceedings, although at the same time conceding that his briefs and points had nowhere referred to such questions. Petitioner's Brief to Court of Appeals in Support of Motion, February 11, 1955, p. 4. This second motion was denied by the Court of Appeals without opinion.

It is clear that an attempt to assign new errors in a petition for rehearing in a state court, which is overruled without an opinion passing on asserted federal questions, cannot import such questions into the record to sustain a writ of certiorari. *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 112, 118; *Herndon* v. *Georgia,* 295 U. S. 441, 443, rehearing denied 296 U. S. 661; *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 128. Moreover, the attempt to import such new issues was in violation of the rules of practice of the state court. Rules of the Court of Appeals of the State of New York (Gilbert-Bliss ed., 1954 Suppl.), Rule VII, pp. 3-4.

In his Petition here, repeating a like claim made to the Court of Appeals in his second motion there, Petitioner asserts that federal questions were mentioned by him in

the oral argument before the Court of Appeals (Pet. 3). To the best recollection of counsel no such questions were orally presented. In any event, the conclusive answer is that the Court of Appeals denied the application to amend the remittitur to show that such questions were presented and passed on. And beyond that, it is well settled that arguments of counsel in state courts are not part of the record and cannot be used to establish that a federal question was raised. *Zadig* v. *Baldwin,* 166 U. S. 485, 488; *Sayward* v. *Denny,* 158 U. S. 180, 183; *Live Oak Assn.* v. *R. R. Comm.,* 269 U. S. 354, 356-359.

Since no federal questions were presented to the court below nor passed on, this Court will not consider such questions on certiorari. *C. I. O.* v. *McAdory,* 325 U. S. 472, 477.

2. Even had federal questions been preserved in the state courts, Petitioner presents no substantial federal question warranting review by this Court.

As posed by Petitioner, the question is whether a state may constitutionally refuse to enjoin peaceful organizational picketing which has gone on for a number of years and which allegedly is destroying the Employer's business. But as we have shown (*supra,* p. 5), the latter factual assumption is directly contrary to the finding of the Court of Appeals and to the record. Thus the question raised by Petitioner is purely a hypothetical one, not involved in the instant case.

Furthermore, even were the question genuinely here, it does not warrant review. It has been established since 1937 that a state may, consistently with the Federal Constitution, enact and apply an anti-injunction act proscribing injunctions against picketing except in limited circumstances. *Senn* v. *Tile Layers Union,* 301 U. S. 468; *cf. Lauf*

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v. *E. G. Shinner & Co.*, 303 U. S. 323, 330. It is late in the day again to raise that question.

A state has the "power . . . to set the limits of permissible contest open to industrial combatants." *Thornhill* v. *Alabama*, 310 U. S. 88, 104. No doubt organizational picketing of a non-union shop may sometimes hurt an employer's business. On the other hand, inability to picket the non-union shop may result in depressing the wage and other union standards in the shops already organized. *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 208-209; *Teamsters Union* v. *Hanke*, 339 U. S. 470, 475. A state must necessarily weigh and balance these conflicting "hurts" when it decides to draw the line so as to permit organizational picketing. This Court has repeatedly refused to assess the wisdom of state policy proscribing picketing where the state's action is not arbitrary. *Teamsters Union* v. *Hanke*, 339 U. S. 470; *Hughes* v. *Superior Court*, 339 U. S. 460; *Building Service Union* v. *Gazzam*, 339 U. S. 532; *Giboney* v. *Empire Storage Company*, 336 U. S. 490; *Carpenters Union* v. *Ritter's Cafe*, 315 U. S. 722. Certainly this Court will not apply a different rule where the state's decision is to allow the picketing —and especially so when one remembers that the free-speech ingredient of picketing makes it constitutionally less doubtful to allow than to forbid picketing.

As this Court has indicated, there might be a constitutional question whether a state is entitled to *forbid* organizational picketing. *Building Service Union* v. *Gazzam*, 339 U. S. 532, 539-540; *Plumbers Union* v. *Graham*, 345 U. S. 192, 200-201. But this is the polar opposite of Petitioner's claim that a state is constitutionally forbidden to *allow* organizational picketing. That contention is clearly without merit and raises no substantial federal question.

Conclusion.

No federal questions were preserved or passed on below. In any event no substantial federal question is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

JACOB FRIEDBERG,
Attorney for Respondents.

Of Counsel:

MORRIS P. GLUSHIEN,
WILBUR DANIELS.

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Appendix.

CIVIL PRACTICE ACT §876-a. Injunctions issued in labor disputes.

1. No court nor any judge or judges thereof shall have jurisdiction to issue any restraining order or a temporary or permanent injunction in any case involving or growing out of a labor dispute, as hereinafter defined, except after a hearing, and except after findings of all the following facts by the court or judge or judges thereof to be filed in the record of the case:

(a) That unlawful acts have or a breach of any contract not contrary to public policy has been threatened or committed and that such acts or breach will be executed or continued unless restrained;

(b) That substantial and irreparable injury to complainant's property will follow unless the relief requested is granted;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial thereof than will be inflicted upon defendants by the granting thereof;

(d) That complainant has no adequate remedy at law;

(e) That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection; and

(f) That no item of relief granted prohibits directly or indirectly any person or persons from doing, whether singly or in concert, any of the following acts:

(1) Ceasing or refusing to perform any work or to remain in any relation of employment;

(2) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any agreement, undertaking or promise;

(3) Paying or giving to, or withholding from, any person any strike or unemployment benefits or insurance or other moneys or things of value;

(4) By all lawful means aiding any person who is being proceeded against in, or is prosecuting any action or suit in any court of the United States or of any state;

(5) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, picketing, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace;

(6) Ceasing to patronize or to employ any person or persons;

(7) Assembling peaceably to do or to organize to do any of the acts heretofore specified or to promote lawful interests;

(8) Advising or notifying any person or persons of any intention to do any of the acts heretofore specified;

(9) Agreeing with other persons to do or not to do any of the acts heretofore specified;

(10) Advising, urging or inducing without fraud, violence or threat thereof, others to do the acts heretofore specified;

(11) Doing in concert of any or all of the acts heretofore specified on the ground that the persons engaged therein constitute an unlawful combination or conspiracy or on any other grounds whatsoever.

2. Such hearings shall be held only after a verified complaint and a verified bill of particulars specifying in detail the time, place and the nature of the acts complained of and the names of the persons alleged to have committed the same or participated therein have been served and after due and personal notice, in such manner as the court

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shall direct, has been given to all known persons against whom relief is sought and also to the public officers charged with the duty to protect the complainant's property. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination and testimony in opposition thereto, if offered, and no affidavits shall be received in support of any of the allegations of the complaint.

* * * * * *

4. No injunctive relief shall be granted to any plaintiff who has failed to plead and prove compliance with all obligations imposed by law which are involved in the labor dispute in question, or who has failed to allege and prove that he has made every reasonable effort to settle such dispute either by negotiation or with the aid of any machinery of mediation or voluntary arbitration, provided for by law or contract between the parties.

5. No injunctive relief shall be granted except to prohibit such specific act or acts as may be expressly complained of in the complaint and the bill of particulars filed in such case and expressly included in the findings of fact made and filed by the court. Such injunctive relief shall be binding only upon the parties to the suit, their agents, servants, employees, or those in active concert or participation with them and who shall by personal service or otherwise have received actual notice of the same.

6. No officer or member of any association or organization and no association or organization participating or interested in a labor dispute (as these terms are herein defined) shall be held responsible or liable in any civil action at law or suit in equity, or in any criminal prosecution, for the unlawful acts of individual officers, members, or agents, except upon proof by the weight of evidence and without the aid of any presumptions of law or fact, of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization, and

(b) actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization.

* * * * * *

8. No permanent injunction shall remain in force for more than six months from the date on which the judgment is signed, provided, however, that the duration of the injunction may be extended for another six months, if after a further hearing initiated and conducted in the same manner as the original hearing the court shall determine that the injunction shall be continued or modified in accordance with the findings of facts on the subsequent hearing.

* * * * * *

10. When used in this section, and for the purpose of this section: (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation, or who are employees of one employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is between one or more employers or associations of employers and one or more employees or associations of employees; between one or more employers or associations of employers and one or more employers or associations of employers; or between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it and if he or it is engaged in the industry, trade, craft or occupation in which such dispute occurs, or is a member, officer or agent of any association of employers or employees engaged in such industry, trade, craft or occupation.

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(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee.